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REPORTS

OF

CASES

ADJUDGED IN

THE SUPREME COURT

OF

PENNSYLVANIA.

BY

THOMAS SERGEANT, & WM. RAWLE, JUN.

WITH

A GENERAL INDEX, AND TABLE OF CASES.

VOL. XV.

PHILADELPHIA:

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No. 171, Market Street.

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Eastern District of Pennsylvania, to wit:

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D. CALDWELL,

Clerk of the Eastern District of Pennsylvania.

JUDGES

OF THE

SUPREME COURT OF PENNSYLVANIA.

WILLIAM TILGHMAN, Esq.	Chief Justice.
JOHN B. GIBSON, Esq.	} Justices.
THOMAS DUNCAN, Esq.	
MOLTON C. ROGERS, Esq., (appointed the 15th of April, 1826.)	
CHARLES HUSTON, Esq., (appointed the 17th of April, 1826.)	

ATTORNEY GENERAL,

FREDERICK SMITH, Esq.

It was the intention of the Reporters to have inserted in this volume, in accordance with the resolution of the Law Association of this city, the Eulogium upon the late Chief Justice TILGHMAN, by Horace Binney, Esq. The unexpected length of the General Index has, however, rendered this impracticable. It will appear in the ensuing volume.

1891

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CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

SOUTHERN DISTRICT—OCTOBER TERM, 1826.

[CHAMBERSBURG, OCTOBER 17, 1826.]

WARNER *against* AUGHENBAUGH.

IN ERROR.

A declaration in replevin, describing one of the articles as a lot of sundries is good after verdict, when the defendant has claimed property, and gone to trial on that plea.

On a verdict for the plaintiff in replevin, on the plea of property, the jury should find the value of the goods, and assess damages for their detention.

ERROR to the Court of Common Pleas of *Perry* county.

A writ of replevin was sued out by the plaintiff below and defendant in error, *Barnet Aughenbaugh*, to replevy out of the possession of *John Warner*, the defendant, divers goods and chattels, viz. among other articles, that which was described in the writ as a *lot of sundries*. To this writ the sheriff returned, that the defendant claimed property, and bond was given. The declaration pursued the writ, and contained an item, described as a *lot of sundries*, valued at two dollars. Defendant pleaded property in himself, to which the plaintiff replied, property in himself *absque hoc*, &c. On these pleadings the parties went to trial, and the jury found for the plaintiff, and assessed the value of the pro-

(Warner v. Aughenbaugh.)

perty taken at seventy-three dollars and sixteen cents; and assessed the damages for the detention at twenty-five dollars and eighty-five cents, with costs of suit, and that he have a return, irreplevisable. It appeared on the record, that the plaintiff prayed a writ of *retorno habendo*, which had been issued.

Penrose, for the plaintiff in error.

1. The description is too vague. A lot of sundries means a *portion*. He has got a judgment for a portion. He can have return only of what he has judgment for. It is not certain even to a general intent. 1 *Chitty Pl.* 237. Certainty, to a general intent, is that which makes the matter certain without recurring to possible facts, which do not appear. Here there is no certainty, without such recurrence. 2 *Wheat. Selwyn*, 914,—“divers goods and chattels,” insufficient.

2. As to assessing the damages, at the amount of the plaintiff's claim. Here the value of the property was submitted, as the standard; but this was to be estimated by a fictitious standard. *Penrod v. Mitchell*, (8 *Serg. & Rawle*, 522,) is precisely this case.

Alexander, contra.

1. When facts are equally in the knowledge of both parties, there is not the same necessity for certainty. 6 *Comyn's Dig. Tit. Pleader*, C. 36. As to the difference between judgment by default and a demurrer,—here the plaintiff substantially showed a good title; but it is cured by pleading over and verdict. 6 *Com. Digest*, 63. *Pleader*, C. 32. Where words not actionable are joined with those that are, the court will intend that the damages are given only for the actionable words. Here there were other goods well described; and some intendment must be made. If the defendant had demurred, the plaintiff would have been entitled to judgment for what is good. 2 *Com.* 495. *Pleading*, 3 *K.* 10.

2. *Penrod v. Mitchell*, bears out the charge. The value of the property given is the measure. The jury were directed not to go beyond the plaintiff's demand.

The opinion of the court, (TILGHMAN, C. J., absent,) was delivered by

ROGERS, J. The defendant has assigned for error, that the description in the declaration, viz. that part of it which spoke of a lot of sundries, was too general.

The declaration, in this case, would undoubtedly have been ill on demurrer; but then, upon the error being pointed out, the court under our act of assembly, would have given leave to amend. What would have been the effect of a demurrer, whether the plaintiff would have been entitled to a judgment on that part of the declaration, which is good, it is unnecessary here to determine, 6 *Com. Dig. Title Pleader*, C. No. 32, Page 63.

(Warner v. Aughenbaugh.)

Instead of pursuing this course, he puts in a plea of property, by which he in effect says, that this lot of sundries, mentioned in the plaintiff's declaration, is his property. This the plaintiff has denied in the record, and the jury have adjudged the lot of sundries to belong to the plaintiff, and have assessed their value. In addition to this, he claimed property in the lot of sundries, when the sheriff came to replevy them, gave a replevin bond for them, and retained the possession of them.

On this state of the record, this court are asked to reverse the judgment, because, says the defendant, the description is so general, that neither he nor the sheriff could know what articles this lot of sundries consisted of, and that he, the defendant, could not be protected in a second suit for the same property. It might be sufficient to observe, that if he had really laboured under this difficulty of want of knowledge, he might easily have protected himself by a demurrer, when he would have been either entitled to a judgment, or would have compelled the plaintiff to set out the description of the goods with more certainty. But how can the defendant now say, that he does not know what the plaintiff meant, by a lot of sundries, after he has claimed property in them, to the sheriff, and on the records of the court, and after he has retained and has now the possession of the very articles for which this suit is brought. But it is said, the description must be so certain, that the sheriff can tell how to make deliverance of the property. This, however, will not avail the defendant, for the sheriff is not bound to redeliver, unless the goods be shown to him by the party; and, in the case of a defendant, it has been ruled to be a good return to say, *Nullus venit ex parte defendantis ad ostendendum bona et catalla*. Neither do I conceive that there is any force in the objection, that the defendant would not be protected by plea of former recovery. This might be done, in case of a second suit, by proper averments and proof. If there should be a difficulty in this, it is one which he might easily have avoided by demurring for the uncertainty in the declaration.

We are not without authority on this part of the case. It seems now to be settled, that a declaration in replevin being certain to a general intent, is sufficient, especially if it be after a verdict. The reasoning of the court, in the case of *Kempster v. Nelson*, 2 *Wheat. Sel.* 913, I conceive to be decisive of the present point. In that case, the declaration was for taking divers goods and chattels, viz. a certain parcel of lint, and a certain parcel of paper. The defendant avowed for rent; and after a verdict for the plaintiff, an exception was taken in arrest of judgment, that the declaration was uncertain, in not specifying the quantities contained in the parcel; but PARKER, C. J., who delivered the opinion of the court, said that the declaration would undoubtedly have been ill on demurrer, but the defendant, having avowed the taking of the goods in the declaration, the avowry had cured the defect, *as thereby both parties had*

(Warner v. Aughenbaugh.)

agreed what the goods were, &c. And, as to the difficulty of delivering the goods upon a *retorno habendo*, in case the avowant prevailed, he said there was no weight in that objection; for the sheriff, when he came to make a return, might have the defendant's assistance to show him which were the goods; and he was not obliged to execute the writ, unless somebody attended to point out the things he was to deliver. 2 *Saund.* 74, *a. note* 1.

The principle upon which the court grounded their opinion, is, "that both parties here agreed what the goods were." Here both parties are agreed what the goods were, viz. the lot of sundries; the defendant by his claim of property to the sheriff, his replevin bond, and plea of property in court; the plaintiff, by his declaration, his replication of property in himself, and his prayer on the record, of a writ of *retorno habendo*.

In one respect, the present is stronger than the case of *Kempster v. Nelson*. That was a motion in arrest of judgment, this is after judgment, in a court of error.

I have considered the second error assigned, and understand the court as saying, that the jury should find the value of the goods, and should assess damages for their detention. In this, there is no error.

Judgment affirmed.

[CHAMBERSBURG, OCTOBER 17, 1826.]

POWER and another *against* NORTH.

IN ERROR.

In *October*, 1815, *N.* contracted with *P.* and *E.*, to convey to them three tracts of land in *July*, 1818, and give them immediate possession, in consideration whereof, *P.* and *E.* agreed to pay one thousand dollars, in three annual payments, of three hundred and thirty-three dollars and thirty-three cents each: it was further agreed, that if *P.* and *E.* did not pay the monies at the times agreed upon, the agreement should be void, and *P.* and *E.* should deliver up the possession to *N.* and pay rent for the time they occupied. *P.* and *E.* paid the first instalment, but no more: they afterwards abandoned the land, and *N.* took possession. *Held*, that *N.* was not bound to refund the instalment he had received, reserving a reasonable rent.

WRIT of error to the Court of Common Pleas of *Cumberland* county.

The plaintiffs in error, *William Power*, jr., and *W. M. Elliott*, late trading under the firm of *Power and Elliott*, were plaintiffs below, and brought this action of *assumpsit* against *Caleb North*, the defendant in error and defendant below, to recover back a sum of money paid by them to the defendant, under an article of agreement made between the parties on the 28th of *October*, 1815, which witnessed that the said *Caleb North*, for and in considera-

(Power and another v. North.)

tion of the monies hereinafter agreed to be paid, kept, and performed by the said *Power* and *Elliott*, he, the said *Caleb North*, for himself, his heirs, executors, and administrators, by these presents, doth agree to make out a deed of conveyance, on or before the first day of *July*, 1818, and by good and sufficient conveyance in law, convey and assure unto the said *Power* and *Elliott*, or their heirs or assigns, all his right, title, claim, interest, and demand, of and to three certain surveys or tracts of land, adjoining and contiguous to the *Mount Vernon Forge Tract* aforesaid: [Here follows a description of three tracts of land, situate in *Greenwood* township, *Cumberland* county:] containing, in the whole, about three hundred acres, be they more or less, which the said *North* is to give the said *Power* and *Elliott*, and the said *North* is to give clear patents for all the said tracts to the said *Power* and *Elliott*, their heirs and assigns, at the same time he gives his deed of conveyance; the said *North* is to give the said *Power* and *Elliott* immediate possession of the aforesaid tracts of land, subject to the lease of *Daniel Young*, deceased, and *Peter Grub*, and the claim of possession of *William Fowler*. In consideration whereof, the said *Power* and *Elliott*, their heirs, executors, and administrators, are to pay unto the said *Caleb North*, his heirs, executors, administrators, or assigns, the sum of one thousand dollars, in three equal annual payments; that is to say, three hundred and thirty-three dollars and thirty-three cents, on the first day of *July* next ensuing the date hereof; and three hundred and thirty-three dollars and thirty-three cents, on the first day of *July*, in the year of our Lord 1817; and three hundred and thirty-three dollars and thirty-three cents, on the first day of *July*, 1818;—when the said conveyance is to be given, together with the patents and other title papers in the possession of the said *North*. It is further agreed between the said parties, that if the said *Power* and *Elliott*, their heirs or assigns, do not pay the said *North*, or his heirs or assigns, the money at the times above-mentioned for payment thereof, then this bargain and sale to be void and of none effect, and the said *Power* and *Elliott*, their heirs, administrators, and assigns, shall, at the request of the said *North*, his heirs, executors, administrators, and assigns, yield and deliver up peaceable possession of the said premises to the said *North*, his heirs, executors, or administrators, as their property, as if this agreement had never been made, and pay a reasonable rent for the time they occupy the same. And, for the true performance of this agreement, the said parties bind themselves to the other, their heirs or assigns, in the sum of five hundred dollars, as witness our hands and seals, this day and year first above written.

In *September*, 1816, the plaintiffs paid the defendant three hundred and nineteen dollars and eighty-one cents, for which the defendant gave them his receipt indorsed on the above agreement, expressing it to be “on the within agreement.” They paid no

(Power and another v. North.)

farther instalment, but abandoned the lands, which were taken possession of by the defendant, *North*.

The plaintiffs requested the court below to charge the jury—

1. That, by the articles of agreement, dated the 28th day of *October*, 1815, between *Power* and *Elliott* and the defendant, in case of a failure to pay the whole amount, or any part of the purchase money therein expressed, according to the provision of the said article, by the said *Power* and *Elliott*, the said article of agreement became void, and in that event the defendant became entitled to the possession of the land therein conveyed, and the plaintiffs became and are now entitled to recover from the defendant so much of the purchase money as was paid on the contract between the parties.

2. That if the jury believe that the said defendant took possession of the land after a failure on the part of *Power* and *Elliott*, to pay the purchase money, according to the terms of the said agreement, that then the said defendant has embraced the remedy provided for him by the said contract, that the contract is rescinded, and the plaintiffs are entitled to recover the amount of the purchase money paid on the said agreement by them, with interest, deducting therefrom a reasonable rent for the occupation of the said land, according to the agreement contained in the said article.

The court below charged as follows:—

“The facts in this case are not disputed; the question is one of law, and arises on the agreement between the parties. The agreement was in force when the money was paid by the plaintiffs to the defendant. The payment was made in pursuance of the agreement, and according to its terms and provisions. The defendant, therefore, received it in good faith, and if there is no agreement to refund, nor failure on *North's* part, so as to render a return equitable, he could hold and retain it in good faith; and if so, the law would raise no promise to refund, and it is not pretended there is any express promise.”

“The bargain and sale was to become void after the default in payment; that is, it was to be prospectively void. By the omission to pay, the plaintiffs forfeited their right to the contract; but no intimation is given that the defendant should, in any event, refund. Their whole contract was in writing; every thing was stipulated in the agreement relative to the covenants of the parties. Nothing was left to implication; and if there is nothing in the agreement indicating an understanding that the defendant should refund, the law can raise none by implication. Where parties make a contract, and monies are paid under it, if the consideration fail, or the contract is rescinded by stipulation, so as to be void *ab initio*, then monies so paid, may be recovered back in *assumpsit* for money had and received. But when the agreement is rescinded by the default of the *payer*, and the payee can conscientiously re-

(Power and others v. North.)

tain, nothing but his express agreement to refund can compel him to do it."

"The agreement to pay rent was to provide for the event of nothing being paid by the purchasers, under the agreement. From the whole agreement, I would infer it not to have been within the intention of the parties, that under the circumstances in evidence, the defendant should refund. Several other points are put to the court for the instruction of the jury, but, as we think the law is against the plaintiffs' recovery, it is unnecessary to go through them."

To this charge the plaintiffs excepted. The jury found a verdict for the defendant, and judgment was rendered accordingly.

Penrose, for the plaintiff in error.

The opinion of the court was, that we were not entitled to recover, and this is the point of all our exceptions. By the express terms of the articles, non payment of money was to be a rescinding, and either might rescind; in which case the article was to become *ipso facto* void, which leaves the parties in their former situation. *North* took possession of the land after it was abandoned by *Power* and *Elliott*. This is a confirmation of their rescinding the contract. He, therefore, cannot conscientiously retain the money paid on the foot of the agreement. In *Gillet v. Maynard*, 5 Johns. 86, the principle is established. He also cited *Weaver v. Bentley*, 1 Caines Rep. 47. It was a question of fact, whether the contract was rescinded, and as such, ought to have been left to the jury.

Carothers, contra.

The *intention* of the parties was, that every thing done under the contract should stand, and that it could be rescinded only prospectively. The right to rescind was introduced exclusively for the benefit of the vendor. He had his election to regain the possession, if the vendees should be unable to complete the contract. This related to the first payment: as soon as that was made, all power to rescind on either side was at an end. Chancery, therefore, would execute the contract, unless the contract was rescinded by the agreement of *both*; and the question is, whether they have so rescinded. No act of this character existed, but the taking of possession by the vendor. The vendees abandoned the possession; the vendor resumed it.

The opinion of the court, (TILGHMAN, C. J. taking no part in the judgment, having been sick and absent at the time of the argument,) was delivered by

GIBSON, J. It is a fair construction of the articles to limit the power to rescind by the act of one party, to the vendor alone. It surely never was intended to permit the vendees to defeat the ob-

(Power and others v. North.)

ject of the bargain, by omitting to do the very thing which they had covenanted to do. On the contrary, it is evident from the scope of the contract, that the provision for rescinding was introduced for the exclusive benefit of the vendor, in case the vendees should be unable to carry the contract into effect. And the power was to be exercised only before payment of any part of the purchase money. We cannot suppose the parties had in view to permit the vendor to put an end to the purchase after it should be completed by payment of all but the last shilling; yet, to this extent might the power be carried, if the exercise of it were permitted under any circumstances beyond the point which I have indicated. The covenant to restore the possession, in case the purchase should not be completed, is altogether consistent with this construction, for by the terms of the agreement the vendees were to go into possession before the time appointed for payment of any part of the purchase money. But, notwithstanding that the time for rescinding by the act of one of the parties had gone by, the contract might, without any provision for it in the articles, undoubtedly be dissolved by the agreement of both; and in that event a right to have the purchase money rescinded in the absence of a stipulation to retain it, would result as much of course, as if the contract were dissolved by one of the parties, under a power specially reserved. As no stipulation for retention was pretended, the true question, therefore, was, whether the contract still existed. The vendees, after having paid part of the purchase money, had suffered losses which induced them to abandon their business and remove from the part of the country in which the premises are situated, and the vendor quietly resumed the possession which was found to be vacant, but did no act which can be considered as inconsistent with a continuance of the equitable ownership of the vendees. Taking possession is, at most, but an equivocal act; and the burden of proving it to the satisfaction of the jury, to have been done with an intent to rescind, lay on the plaintiffs, without which they would not make out a case. Even a recovery in ejectment for non payment of the purchase money, has been considered as not necessarily dissolving the contract. *Youst v. Martin*, 3 Serg. & Rawle, 423. The court, therefore, were right in their conclusion that the plaintiffs had failed. But it is now contended that the intent with which the possession was resumed, ought to have been left to the jury. Had the counsel treated the intent of the vendor as matter of fact in the court below, there would be much force in his objection; but the decision of the point was submitted by him as matter of law; and in that aspect it was, undoubtedly, rightly decided. He prayed the court to direct the jury that if the vendor took possession, after a failure by the vendees to pay the purchase money, he had embraced the remedy provided for him; and that the contract was *ipso facto* rescinded. In this he was undoubtedly wrong, the act of taking possession being, as

(Power and others v. North.)

I have said, equivocal. And if he had thought that the actual intent of the vendor could be called in aid of his case, it was his business to submit it as a matter of fact to the jury, instead of which, he submitted it as matter of law to the court; and it was held in *M'Ilvaine v. M'Ilvaine*, 6 *Serg. & Rawle*, 559, that if a counsel ask a question of the court, which is answered against him, he cannot assign for error, that the court charged on matter of fact. The assignment of error, therefore, is not sustained.

Judgment affirmed.

[CHAMBERSBURG, OCTOBER 17, 1826.]

SCOTT *against* WAUGH.

IN ERROR.

The owner of *Nell*, a female slave, duly registered, directed by his will that she "be continued with *M*, my well beloved wife, during her widowhood, or natural life: that, if she marry, *Nell* be valued at whatever time is to come of twenty years from this date, and the money arising therefrom to be proportionably divided between *M*. and *W*. if her widowhood or natural life exceed twenty years from this date, then *Nell* is to be free, when either of these takes place, after this term, not before." The plaintiff, (the son of *Nell*,) was born after the testator's death, and within the said twenty years, and while *Nell* was owned and held by the widow and was registered, and afterwards transferred by the widow to the defendant. The widow married again, in the year the transfer was made. Held, that the plaintiff was a freeman.

ERROR to the Court of Common Pleas of *Adams* county.

Homine replegiando at the suit of *John Scott*, a coloured boy, against *John Waugh*, in which the court below rendered judgment for the defendant on the following facts, agreed by the parties to be considered as a special verdict, with a right to either party to prosecute a writ of error, as if the facts had been found by a jury, without affidavit or bail. The plaintiff, *John Scott*, was the child of Negro *Nell*, who was the slave of *Aaron Finley*, of the county of *York*, and was regularly registered by the said *Finley* of *York* county, as a slave. Agreeably to the act of assembly, *Aaron Finley* made his last will and testament, duly executed and dated, the 10th day of *September*, 1793; which will, after the death of the testator, viz. on the 27th day of *September*, 1794, was duly proved and approved, and the testator, among other things, bequeathed Negro *Nell* to *Margaret Finley*, widow of the testator, in the following words:—"I further will, that *Nell* be continued with *Margaret*, my well beloved wife, during her widowhood, or natural life; that, if she marry, *Nell* be valued at whatever time is to come of twenty years from this date, and the money arising therefrom be proportionably divided between *Maria* and *Wil-*

(Scott v. Waugh.)

liam; if her widowhood or natural life exceed twenty years from this date, then *Nell* is to be free when either of these takes place, after this term, not before." *Scott*, the plaintiff, was born on the 10th of *May*, 1803, within the term of twenty years after the death of the testator, and during the time Negro *Nell* was owned, held, and claimed by *Margaret Finley*, under the will, and was duly and regularly registered by the said *Margaret*, who then remained unmarried, and the widow of the testator, on the 19th of *October*, 1803. *Margaret Finley*, in the year 1809, for a valuable consideration to her paid, sold and transferred *Scott* and his unexpired term of service, to *William Waugh*, and *Waugh* made his last will in writing, duly executed, by which he, among other things, bequeathed *Scott*, by the name of his boy *Jack*, to his son *John Waugh*, the defendant. The defendant claims and holds the said *Scott* as a servant, until the age of twenty-eight years. *Margaret*, the widow of *Aaron Finley*, married a second husband in the year 1809, Negro *Nell* being then and still in full life.

The court below rendered judgment on this case in favour of the defendants.

Stephens, for the plaintiff in error.

The issue of none but slaves is to be recorded. The nature of the servitude is changed by the will; as much as if the change were made by law. The child, therefore, was born free. The recording acts operate only on the issue of slaves.

Carothers, contra.

Before the abolition law, there were but three classes of servitude:—slaves, properly so called; servants till thirty-one years; and apprentices and redemptioners. The case of the mother here does not fall under the two latter, and it consequently *must* fall under the former. A servant for years is bound to recompense the master for the offence of having children: she is not to be in a better situation.

Stephens replied.

The opinion of the court was delivered by

DUNCAN, J. Children follow the condition of their mother. The only question on this case stated in the nature of a special verdict, is this,—was *Nell*, the mother of the plaintiff, a slave at the time of her birth? If she was not, the registry would not make her a servant until twenty-eight, and he is a free man. By the act for the gradual abolition of slavery, every negro and mulatto child born thereafter, who, in case the act had not been made, would have been a servant for years or life, or a slave, instead of following the condition of his mother, is made a servant until twenty-eight; and, by the supplement to that act of the 29th of

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March, 1788, the possessor of such child, that is, the child of a slave, is required to register him, in a prescribed form, under the penalty of losing all right to such child, and his being immediately free. The plaintiff, if he be a servant for years, would have been a slave for life, had it not been for those laws. By the will of the owner of *Nell*, (*Aaron Finley*,) *Nell* ceased on his death to be a slave, and became a servant for years. No one can be partly a slave and partly a servant for years, or free: he must be the one or the other entirely. Slaves for life are a distinct class of human beings, without any civil right or privilege. They can acquire no property, because they are themselves the property of another. If a slave is convicted of a crime, whose punishment is death, the jury trying him is to appraise and declare his value; and, in case he is executed, that value is to be paid out of the state treasury. If *Nell* had been executed for crime, the state would not have been bound to pay to the person entitled to her services for twenty years, her value for life, because no one was entitled to her services for life. "My will is, (says the testator,) that *Nell* continue with *Margaret*, my wife, during her widowhood or natural life; and, if she marry, *Nell* shall be valued at whatever time is to come of twenty years from this date, and the money arising therefrom shall be proportionably divided between my children, *Maria* and *William*: if her widowhood or natural life exceed twenty years from this date, then *Nell* is to be free when either of these takes place, after this time and not before." The services of *Nell* are secured to his family until twenty years after making the will. It is a plain declaration by the testator, that *Nell* shall be a servant for twenty years. Without deciding an abstract principle, as to manumission at a future day by the master, it is sufficient to say, that the master and owner of the slave *Nell* has declared that she shall, from the date of his will, be no longer a slave; but that she shall be and continue a servant for twenty years. Her *status* and condition in life was changed: her perpetual bondage was converted into a servitude for years, with all the consequences attending it, which attend a servitude for years. The curse of slavery was removed by the benevolence of her master, from the mother, and could not attach against her offspring born afterwards. The testator might have altered or revoked his will, and she continued a slave, or he might have sold her. The manumission from slavery and perpetual bondage took effect on his death: the will had, until that event, no operation. Different states, where slavery is tolerated, may prescribe particular forms and terms of manumission. Most of these *United States* in which such state of slavery still exists, have done so; but we are judging by the laws of this state, which prescribe no particular solemnity, and on the intention of the testator expressed in his will. No doubt the testator might have made the mother free at a particular period, and declared her issue should continue slaves; but he has not so declared. It was asked of the

(Scott v. Waugh.)

counsel of the defendant, to whom did the issue belong, whose servant was he? The counsel seemed to admit that he belonged to the personal representatives. To his widow, under whom the defendant claims, he did not belong. She had only a claim to the services of his mother during her widowhood. His representatives have not registered the plaintiff, nor do they claim him. In 1809, when the widow married, she lost all right to the services of the mother. The value of the residue of the twenty years, which *Nell* had to serve, was bequeathed to the children of the testator. The manumission here does not depend on the principles of contract, but is an act of benevolence by a last will, on which the intention of the testator is to prevail, and a liberal and large construction should be given to effectuate such intention.

The testator has not bequeathed his property in *Nell* to any one,—her services for twenty years he has. I cannot conceive why it is the widow of the testator could hold the issue: the property in the mother was not in her, if the issue is now the servant of any one, it must be of the children; for, on her marriage, the widow forfeited all the right to the term of years she had in the mother. The children set up no claim from 1809. The presumption is, that they have abandoned all claim to her services, if they ever had a right. Between the children and the present defendant there is no connexion, neither privity of estate nor privity of contract. But I do not think he was the servant of any one: the implication is a manifest one, that all his legatees should have of interest in *Nell*, was her service for the residue of the twenty years; he did not intend the issue should be servants: he has not said so. If the act of abolition had not passed, this man, if he is now a servant would then have been a slave, and his issue, *ad infinitum*. This difference can make no change in the construction of the will. It never can be supposed, that this testator bequeathing the services of *Nell* for twenty years, and no longer, and that she should then be free, intended her issue should be slaves. He minutely regulates the right any one should have in *Nell*, in any event, to twenty years. It would be an unnatural construction of this will to say, that he died intestate as to the issue, and that the issue descended as property to his children, who had not the property in *Nell*, but her services for twenty years.

On the whole case, my opinion is, that there is a middle state between servitude and slavery, and that *Nell*, on her master's death, became a servant for twenty years; and, consequently, her children as much free as the children of any white woman. There is not much to be found in the books on the question: there is, however, one case, whose principles strongly bear on it, *Oakford v. Waring*, 14 Johns. 184. It was there decided, that where two of three tenants in common of a slave manumitted him, this was sufficient to entitle him to his freedom; and the reason given by Mr. Justice SPENCER, who delivered the opinion of the court, was,

(Scott v. Waugh.)

that no one can be partly a slave and partly free, or a slave for one third of the time and free two thirds; he must be either the one or the other entirely, and, that he had, no doubt suffering the plaintiff to act as a freeman, without any claim or pretence that he was a slave, would authorize the inference of a manumission by the other tenants in common, and every presumption in favour of liberty and freedom ought to be made. No one, after the testator's death, had a property in *Nell* for life. She, then, was not a slave for life; and, not being a slave for life, her children must be free. I am therefore of opinion that the defendant is a free man, and that the judgment should be reversed, and judgment entered for the plaintiff.

Judgment reversed, and judgment entered for the plaintiff.

[CHAMBERSBURG, OCTOBER 17, 1826.]

CURTIS *against* BUZZARD.

IN ERROR.

Where there are several actions depending, by the same plaintiff against different defendants, and the parties agree that the verdict and judgment in one case shall govern all, and the same witnesses are examined in each suit, the plaintiff is not entitled to recover from each defendant the costs for the attendance of each witness, and mileage.

ON a writ of error to the Court of Common Pleas of *Franklin* county, it appeared that this was an action of replevin for sheep, brought by *Azabah Curtis* against *John Buzzard*. The plaintiff brought ten other actions of replevin against ten other persons, for sheep, all part of the same flock, and the property depending on the same title. It was agreed, that only one of these actions, viz. the one in which *David Washebaugh* was the defendant, should be tried, "and all the others should be governed by the verdict and judgment in that case, whether for the plaintiff or defendant; and, in case it should be for the plaintiff, then, in each of the other cases, the damages should be calculated by the number of sheep, in proportion to the damages found in that case." The plaintiff obtained a verdict and judgment against *Washebaugh*, in which the costs of all the witnesses were taxed. The same witnesses were summoned in each suit, and the only question was, whether the plaintiff was entitled to recover from each defendant the costs for the attendance of each witness, and of mileage.

McCulloch, for the plaintiff in error, observed that the agreement to try but one cause was not made until the time of swearing the jury. It would be unreasonable and unjust to compel one defendant to pay all the costs, and it would be difficult to apportion

(Curtis v. Buzzard.)

them. Another objection to the course pursued by the court below is, that the defendant against whom the costs are taxed, may prove insolvent, and thus the plaintiff lose his costs altogether. The circumstance of all the witnesses being summoned by the same plaintiff, can make no difference, because the court will not inquire into any case, except the particular one in which the costs arise.

Crawford, for the defendant in error, answered, that the act of assembly considered a certain sum per day a sufficient compensation for attendance. *Act of the 27th of February, 1821, Purd. Dig. 295.* Suppose the verdict had gone against the plaintiff, must he have paid the witnesses eleven times over? This will scarcely be contended for, and yet the opposite argument goes that length. A justice of the peace is not allowed costs, as a witness for the commonwealth on the first day of the court, when he attends to return his recognizance. 6 *Binn.* 397.

The opinion of the court was delivered by

TILGHMAN, C. J. Unless the plaintiff is liable to the witnesses for their attendance in each suit, he cannot recover it, because he can recover no more than he pays, or is liable to pay. Now, it would be extraordinary, indeed, if a witness could demand the price of eleven days' attendance, when in fact he attended but *one*. The law admits of no such extravagancies. He is to be paid a certain sum fixed by law, for each day's attendance, and, having received that, he is entitled to no more. The principle which must govern this case has been established by this court. We decided, that a justice of the peace, who attends as a witness in a criminal case, is not entitled to any allowance as a witness on the *first* day of the court, because it is his duty to attend on that day, and make return of the recognizance taken by him. 6 *Binn.* 397. So also we decided, that when the same parties referred two suits to the same arbitrators, who transacted business in each of the suits on the same day, they should be allowed but one day's pay, because they were employed but one day.

In the present case, the witnesses received full compensation for each day's attendance, in the action against *Washebaugh*. Therefore they can demand no more from the plaintiff, nor can the plaintiff recover it from the defendant. The Court of Common Pleas was right, therefore, in refusing to tax the attendance of those witnesses as costs in this case. If it should happen that the same person should be summoned as a witness by different parties in different suits, the court may easily do justice by apportioning the costs of attendance among the persons by whom the witness was summoned.

I am of opinion that the judgment should be affirmed.

Judgment affirmed.

[CHAMBERSBURG, OCTOBER 17, 1826.]

HILDEBRAND *against* DEARDORF.

IN ERROR.

Defendant was surety with *P.*, for land taken by *P.* at an appraisement, in a recognizance for the payment of distributive shares, one of which belonged to the ward of *D.* *D.* afterwards took a bond from defendant and *P.*, with a view to release the recognizance, on which bond the present suit was brought. After this suit, *D.* instituted an action on the recognizance, to recover an amount of interest for which he had taken *P.*'s note, and had judgment, and a levy on the lands, and a return of unsold for want of buyers: *Held*, to be no defence to the present claim, either in whole or in part.

THIS was a writ of error to the Court of Common Pleas of *Adams* county.

Henry Pickering, and *John Hildebrand*, his surety, entered into a recognizance to the Orphans' Court of the county of *York*, conditioned to secure the payment of the distributive shares of his brothers and sisters, arising from the estate of his father, taken by him at the appraisement. After the recognizance was taken, the plaintiff in this suit, who was the guardian of *Rebecca Pickering*, a daughter of the intestate, made an arrangement with *Henry Pickering* and *John Hildebrand*, to release the recognizance, so far as respected *Rebecca's* claim, and to take, instead thereof, the bond of them, for the recovery of which this suit was brought.

The defence relied on was, that, in pursuance of an agreement between *Henry Pickering*, the principal, and *John Deardorf*, the guardian, and without the consent of the surety, a *scire facias* was issued against *Henry Pickering*, on the recognizance, at the suit of *Rebecca*, a judgment obtained, on which there was a *fieri facias* upon which there a levy on the land taken at the appraisement, a *venditioni exponas*, and a return by the sheriff, that the land remained unsold for want of buyers. It appeared, that the proceeding in *York* county was intended to secure only the amount of interest, indorsed on the bond, as paid, which never had been received, *Deardorf*, having taken the note of *Henry Pickering* for the amount, which note *Pickering* had failed to discharge. The plaintiff gave the defendant credit for the payments indorsed on the bond, and relied upon the proceedings in *York* county, to recover it from *Henry Pickering* the principal. The suit on the recognizance was instituted since the commencement of this action.

The defendant contended that these circumstances were an absolute discharge of him, as surety; and, secondly, if not an absolute discharge, they constituted a defence *pro tanto*.

(Hildebrand v. Deardorf.)

Carothers, for the plaintiff in error.

We were discharged from the amount of the credits on the bond by the receipts indorsed, and the note given for those sums by *Pickering*. The release of the recognizance was the consideration of the bond, and the benefit we derived was having the land bound by this and other recognizances released, and the fund pledged for other recognizances, on which we were personally liable, enlarged so as to enable the plaintiff to get satisfaction out of that fund without recourse to us. By again coming on the land, we are injured *pro tanto* as to every thing drawn from it. The plaintiff was bound to look to *Pickering* for the amount of the note, and not to recover it out of our fund, which he had released. Having obtained from us, we are entitled to a credit *pro tanto* on that ground, and also to a further credit for the same sum on the ground of his having released so much of the bond, in consideration of the note drawn by *Pickering*.

Stevens, contra.

This defence ought to have been set up in the *scire facias* on the recognizance. It cannot be set up in a suit which was brought long before these transactions took place. None but transactions relative to the contract which is the meritorious cause of action, can be made the ground of a particular equity. Equity arises from intrinsic and not extrinsic circumstances. The court gave the party all he asked. By giving the notes, there was only a change of security for the same debt.

Carothers, in reply.

If judgment had been obtained on the notes, and the land bound by the recognizance had been levied, it would have been sold subject to the recognizance, which shows that the bail was injured by the sale on the recognizance.

The opinion of the court was delivered by

ROGERS, J., (after stating the case.) I cannot perceive how *Hildebrand*, the surety, can be considered as absolutely discharged from his liability in this bond. It is not put to the court and jury on the ground of an actual fraud, or combination between *Pickering* and *Deardorf*, to cheat and defraud *Hildebrand*, the surety. Had there been a combination between them to cheat and defraud the surety, out of part of an entire sum, it would, I apprehend, so far as respects the surety, have avoided the whole bond. It would have proved a complete defence to the whole amount claimed in this action. If, however, the defendants relied upon an actual fraud, the attention of the court and jury should have been drawn to it, either by a plea of fraud, or by notice of special matter, in which the fraud and combination should have been distinctly

(Hildebrand v. Deardorf.)

charged. It has been ruled in a case decided at *Lancaster*, (*The President of the Orphan's Court, for the use of Graff and others v. Graff*.) to be insufficient to state facts and circumstances, from which a jury may infer fraud.

If that had been the issue here trying, what difficulty could the jury have had? It certainly was not in the contemplation of *Deardorf* and *Pickering* to defraud *Hildebrand*. The arrangement was merely intended by them to secure the payment of the interest indorsed on the bond as paid, when in truth and in fact it remained unpaid. Not that the surety should pay, but that it should be taken out of the funds of the principal.

It will be observed, that I take the distinction between an actual and a legal fraud. In the one case, it would avoid the whole bond; in the other, it would be an avoidance *pro tanto* only. And this leads me to consider, whether this be a defence *pro tanto*; whether the surety has received any injury whatever, from the arrangements and proceedings of his principal, and *Deardorf*, the guardian of *Rebecca*.

What may be the effect of the proceeding in *York* county; whether they have or can lessen the security of *Hildebrand*, as bail in the recognizance, it is unnecessary here to determine. Is it a defence to this action? If it be a defence *pro tanto*, it can only be for the amount actually received. Here the suit was brought in *York* county, after the suit in *Adams* county; and at the time of trial nothing had been recovered. It is true, a judgment had been obtained, a *fieri facias* and *venditioni exponas* had been issued; but the land had been returned unsold for want of buyers. What sum then could the jury have deducted from the bond? clearly not the amount of the judgment, for peradventure it may never be recovered. I cannot therefore perceive how *Hildebrand* has sustained such an injury, as to avail him, in his defence to this suit. If his interest be affected, on which I would not wish to be understood as giving any opinion, he must resort for redress to the Court of Common Pleas for the county of *York*.

Judgment affirmed.

[CHAMBERSBURG, OCTOBER 17, 1826.]

FRAZIER and another, Administrators of FRAZIER, against
FUNK.

IN ERROR.

The court may allow the jury to take out with them the statement of particular items of account by a party and calculations, but no item should be inserted, unless there has been some evidence given of it.

THIS case was brought up by writ of error from the Court of Common Pleas of *Perry* county, and the plaintiffs in error were plaintiffs below. A verdict and judgment were rendered for the defendant, and a certificate returned by the jury that the plaintiffs were indebted to him in the sum of two hundred and thirty dollars and eighty-two cents.

The defendant admitted the plaintiff's claim in the court below, which was founded on a note for one hundred and four dollars, but relied on a set-off to a larger amount, and the single question before the court here was, whether the court below had erred in allowing the defendant to hand to the jury, as they went out to consider of their verdict, the following paper, containing certain items with calculations.

HENRY FUNK'S STATEMENT AND SET-OFF, AND CALCULATIONS
MADE OF THE SAME.

To boarding <i>Paul Frazier</i> , sen., washing and mending for him, and taking care of his person, from the first day of <i>April</i> , 1815, to the first day of <i>February</i> , 1819: three years and ten months,—equal to one hundred and ninety-six weeks, at two dollars per week, - -	\$392,00
To taking care of the person of <i>Paul Frazier</i> from the time he was struck with the palsy; to wit, from the tenth day of <i>May</i> , 1818, to the first day of <i>February</i> , 1819: eight months and twenty days,—equal to two hundred and sixty days, at seventy-five cents per day, \$195,00	
To cash paid <i>Alexander Rodgers</i> , for tax, -	1,00
To do. Esq. <i>Doyle</i> , <i>M'Farland's</i> paper, 4,65	
Interest from the 4th of <i>May</i> , 1819, to the 6th of <i>February</i> , 1823, - - -	1,05 5,70
To cash paid <i>James Given</i> for funeral, 7,05	
Interest from the 3d of <i>August</i> to the same time, - - - - -	1,47 8,52
	<hr/>
	\$15,22

(Frazier and another, Administrators of Frazier, v. Funk.)

	<i>Amount brought over,</i>	\$602,22
To cash paid <i>Jesse Kirkpatrick,</i>	- 5,00	
Interest from the 3d of <i>August, 1819,</i> to		
the same time, - - - -	1,05	6,05
	<hr/>	
To cash paid <i>Henry Aken,</i>	50,00	
Interest from the 1st of <i>September, 1816,</i>		
to the same time, - - - -	19,25	69,25
	<hr/>	
		\$75,30
		<hr/>
Note from <i>Funk to Frazier,</i> - -	\$104,00	\$677,52
Interest from the 14th of <i>February, 1820,</i>		
to the 6th of <i>February, 1823,</i> - -	18,72	122,72
		<hr/>
		\$554,80

Ramsey, for the plaintiffs in error.

The court had no right to send out the defendant's statement: it can be done only by consent. *Alexander v. Jameson*, 5 Binn. 238. The practice will give rise to management, and be attended with pernicious consequences.

Metzger and *Carothers*, in reply, were stopped by the court.

GIBSON, J., delivered the court's opinion. (TILGHMAN, C. J., being indisposed during the argument, took no part in the decision.)

With reasonable caution on the part of the court, no unfairness can be practised in sending out a paper such as this. Of its consequences, no test is so good as experience, and that proves not only its fairness, but its great utility. Indeed, where accounts are submitted to a jury, it would be impossible to get along without it. It originated with mutual convenience and the agreement of parties; but it has prevailed so long and so uninterruptedly as to have grown to be a rule of practice, and as such we are not bound to disturb it. It is doubtless susceptible of abuse; and the court ought to see that what purports to be a mere statement of particulars, be so in fact, that it be subservient only to purposes of calculation, and contain no item of which at least evidence has not been given. Thus restricted, a statement of particulars will afford salutary assistance to jurors, who are seldom expert at accounts. There was therefore no error in permitting the paper to go out.

Judgment affirmed.

[CHAMBERSBURG, OCTOBER 26, 1826.]

**GARDNER and another, Administrators of GARDNER,
against FERREE.**

IN ERROR.

The surety in a bond, a short time before he died, directed his wife to request the obligee, to sue out the bond, as he could get the money then of the principal. Five months after the death of the surety, the wife, not being administratrix, communicated this message to the obligee; who offered her the bond to bring suit on, which she refused. *Held*, that these circumstances did not discharge the surety, though, by delay in bringing the suit, the property of the principal was levied on by another judgment creditor, and sold.

ERROR to the Court of Common Pleas of Adams county.

Jacob Ferree, the plaintiff below and defendant in error, brought this suit against *Jacob Gardner* and *John Wiseman*, administrators of *Martin Gardner*, deceased, the defendants below and plaintiffs in error, on a joint and several bond given by *William Gardner* and *Martin Gardner*, dated the 1st of *April*, 1816, conditioned for the payment of two hundred and fifty dollars and forty-seven cents, with interest, and it was tried under the plea of payment with leave, and a verdict given for the plaintiff below.

The facts were stated in the charge of the court to the jury to be, that *Martin Gardner*, a short time before he died, said his estate should not pay this bond; that he was only bail, and it could be now had of *William Gardner*, the principal. *Martin* soon died. Some time after, the witness went with the widow of *Martin* to *Jacob Ferree*, the plaintiff, and she told him that *Martin* had said he must push Mr. *Gardner*, for it could be got from him now: and, if he did not, *Martin's* estate would not be liable, he was only bail. It was near the court, or after court, and *Ferree* said he could not till after the court, but offered the bond to her, and told her to sue, which she refused. Suit was brought to *August* Term, 1821, and judgment had: no *feri facias* issued. On a judgment afterwards had against *William Gardner*, and *feri facias* to *April* Term, 1822, at the suit of some other creditor, the money was made. The witness stated that Mr. *Gardner* had his personal property about him until it was sold in the last mentioned suit. Letters of administration issued about 1819 or 1820, to the defendants.

The court then instructed the jury as follows:—

“The first point made by the plaintiff, is, that the widow had no right to demand a suit to be brought, and that it imposed no obligation on *Ferree* to sue. It appears to me like a casual conversation between the widow and the plaintiff, not calculated sufficiently to put him on his guard, so as to inform him that if her

(Gardner and another, Administrators of Gardner, v. Ferree.)

request was refused, he would lose his debt. A demand coming from a stranger, if in any event good, should certainly be very pointed and clear; free from doubt or misinterpretation, giving information to the plaintiff that he would certainly lose his money, if he did not immediately proceed. I cannot consider the conversation referred to as sufficiently precise and specific, coming from the person it did, and standing in the relation she did to the parties.

"The offer of the bond to the widow to sue upon it, and thus to save the estate of *Martin*, shows how reasonable it is, that such demand should not be made by a stranger, but by a person standing in the relation of surety.

"Although *Martin Gardner* may in his lifetime, on his death-bed, have warned his wife that she should notify *Jacob Ferree* to prosecute this claim against *William Gardner*, or his estate would not be liable, and she in the presence of a witness, some time after his death, communicated that warning to *Jacob Ferree*, it would not discharge the defendants."

To this charge the defendants excepted.

Stephens, for the plaintiff in error.

The simple point on which the case was put, was, that the direction of a surety on his death-bed to his wife, to inform the obligee to sue, will not, if executed by the wife, be sufficient to discharge the bail. The authority of the wife to demand suit to be brought, was not revoked by the death of the husband.

Carothers, contra.

The offer to permit the wife, who acted on the part of her husband, to bring suit on the bond, obviated every claim to a particular equity from the notice. The wife's authority expired with her husband. There were other persons, namely, the administrators, under whose control the whole matter was, when the notice and request were given by the widow. There was an interval of a year, or at least five months from the death of the husband. No one but the administrators could move in the matter, and the plaintiff was bound to attend to the requisition of no one else.

The opinion of the court, (TILGHMAN, C. J. taking no part in the judgment, having been indisposed during the argument,) was delivered by

GIBSON, J. Courts of equity have gone to an extreme in favour of sureties, often granting relief for a constructive equity, the existence of which the surety himself did not even suspect. I would be unwilling, in cases of this sort, to go beyond the rule in *Cope v. Smith*, 8 Serg. & Rawle, 110, that the surety shall be exonerated only where the obligee has refused to bring suit, or, (what I take to be the same thing,) to suffer the surety to do it in his name, after a positive request and explicit declaration by the surety that

(Gardner and another, Administrators of Gardner, v. Ferree.)

he would otherwise hold himself discharged. The reporter has added a query, whether the surety would be discharged, if it should appear that the insolvency of the principal would have prevented the money from being obtained, if suit had been brought when required. Surely not. A surety is liable at law, and when he comes into equity, he ought to show a substantial ground of relief,—actual injury, and not a mere possibility of injury from the negligence of the obligee,—for an equity can arise from nothing less. A constructive injury can give rise only to a constructive equity, which is insufficient to discharge an obligation arising from one of the most solemn acts known to the law. He surely ought not to be exonerated, because the obligee did not choose to indulge him in an experiment that would have produced no consequences. He ought to show that his request was reasonable, and that he was deprived of what was not merely a speculative benefit. In the court below no difficulty was made as to this, and we are to suppose that the money might have been obtained from the principal. But it appeared the surety had declared on his death-bed that his estate should not be liable for this debt, as he was only a surety, and the money might be had of the principal; that some time after his death, (how long is not stated in the record, but it is agreed to have been about five months,) his widow informed the obligee, that her husband had said, “he must push *William Gardner*,” the principal, for that the money could be got from him then, and that if he did not, the estate of her husband, who was only a surety, would be exonerated; and that the obligee refused to do so then, but offered her the bond with permission to sue in his name, which she declined. I intimate no opinion of the court, whether such a request made *immediately* after the husband’s death, but before the widow had administered, would carry with it the authority which the husband had over the subject-matter in his lifetime. For myself, I say it would not. A man can exercise a control over his estate, after his death, only by the instrumentality of a testamentary direction, which this was not; and the instant, therefore, that the surety died, the right to stir in the matter devolved on his personal representatives. If a case should occur, in which it would be necessary to act before administration could be obtained, the interest of the widow in behalf of herself and her children, would be a sufficient authority; but she is entitled to administration instantly. Certainly she would have no authority, after administration granted to another. I am therefore of opinion the obligee might consider her as a stranger. But I have the authority of the whole court in saying, that under the circumstances of the case, the request came too late; and that at so distant a period, the obligee might disregard the request of any one but the legal representative. And, besides, the offer to permit the widow to use the bond, in any way she might think beneficial to her husband’s estate, would effectually rebut any equi-

(Gardner and another, Administrators of Gardner, v. Ferree.)

ty that might otherwise have arisen. If she be considered competent to act in the matter at all, she must be considered so for every purpose. Now, what more can be required than to invest the surety with the means in the power of the obligee. The surety does not stand on the ground of a legal advantage, but the obligee does, and he is not bound to do a single act to assist the surety, when the surety can help himself; it being his duty only to permit the surety to manage the legal responsibilities of the parties, so as to cast the burthen where it ought to be borne. The offer of the plaintiff, therefore, furnished a decisive objection to the equity set up; and, waiving other considerations, the plaintiff was on that ground entitled to recover.

Judgment affirmed.

[CHAMBERSBURG, OCTOBER 31, 1826.]

HARWOOD and another *against* RAMSEY and another.

IN ERROR.

The *Pennsylvania Agricultural and Manufacturing Bank*, in part payment of their banking house by them sold to *T. and I. H.*, received an assignment from one who was himself the assignee of a judgment, against *W. and M. B.*; the assignors of the judgment in both instances guarantying its payment. Between the date of the first and second assignment, other judgment creditors of *W. and M. B.* had sold their property, and a surplus from the proceeds was left in the sheriff's hands. *Held*, that whether or not the second assignor was liable on his guarantee, before the bank proceeded against the sheriff, depended on whether the Bank, at the time of taking their assignment, knew of the execution issued and proceedings thereon.

The relevancy or irrelevancy of evidence is a matter for the sound discretion of the court.

A bank winding up its concerns, and selling out its banking house may receive in part payment therefor the assignment of a judgment against a third person.

WRIT of error to the Court of Common Pleas of *Cumberland* county.

Alexander and Williamson, for the plaintiffs in error, and *Carothers*, contra.

The opinion of the court, (TILGHMAN, C. J., not giving any opinion, in consequence of sickness and absence,) was delivered by

ROGERS, J. The *Pennsylvania Agricultural and Manufacturing Bank*, were the equitable owners of a house and lot in the borough of *Carlisle*, which had been occupied by them, in the necessary transaction of their business as a banking house. The stockholders having agreed, that the business of the bank should be wound up, and having no further use for the house and lot, it was sold by

(Harwood and another v. Ramsey and another.)

the agents of the bank to the plaintiffs, *Thomas* and *James Harwood*. The bank, in part payment, took the assignment of a judgment for one thousand dollars, to the *January* Term, 1818, (*Aughenbaugh and Clippinger v. Michael and William Baker*), with a *cesset* until the 13th of *May*, 1818.

Five days after the *cesset* expired, viz. on the 18th of *May*, 1818, there is this assignment:—

“For value received, we assign the above judgment to *Fahnestock* and *Gallagher*, and guaranty the payment of the same.

“*Barnet Aughenbaugh*.

“*John Clippinger*.”

There is also this assignment on the record:—

“For value received, I do hereby assign and transfer to the *Pennsylvania* Agricultural and Manufacturing Bank, all my interest in the judgment in this case, and the money due thereon, and I also guaranty the payment thereof. Witness my hand, the 11th of *December*, 1819.

“*Thomas Gallagher*.”

Thomas Gallagher was one of the firm of *Fahnestock* and *Gallagher*, and there is no exception taken to his power to assign the whole interest of the firm in this judgment. It is agreed that the guarantee of *Gallagher* shall be considered as the act of the plaintiffs in this suit. And that the claim of the bank shall be tried and set off by the defendants, if *Gallagher* be liable on his guarantee.

There were several judgments docketed in favour of different persons against the *Bakers*, prior in date to this judgment, assigned by *Gallagher* to the bank.

Subsequent to the first assignment, on the 23d of *May*, 1818, but before the 11th of *December*, 1819, the time of the second assignment, executions had been issued on the first judgments, the real and personal property sold, and the money made, and in the hands of the sheriff. It appears, that after satisfying prior judgments, there was a balance, the amount not yet ascertained, in the hands of the sheriff, applicable to the judgment assigned. The *Bakers* had absconded secretly—*William* about the 14th of *April*, 1818, *Michael* some time before.

From this statement of facts, it is perfectly obvious that there has been a strange neglect, or want of knowledge of this business, from its very commencement. The property of the *Bakers* was sold during the time that *Fahnestock* and *Gallagher* were the equitable owners of the judgment. Had ordinary diligence been used by them, there would have been no difficulty in securing the residue of the money, after payment of the prior judgments and executions. The amount ascertained, it would have been only necessary for them to have demanded payment from the sheriff, and if payment had been refused, to have ruled and attached him, or

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brought suit against him, or his sureties, on their bond, in a sum stated in the recognizance. It is not pretended, that at that time the bail of the sheriff was discharged by lapse of time, nor that they were unable to pay any amount of money, for which the sheriff may have been in default. Indeed, I cannot perceive what will prevent the recovery of the money at this time, by a suit on the recognizance against the sheriff. The bail are discharged, but the sheriff is not; and the recognizance was and continues to be a lien on the real estate of the sheriff.

Without taking any steps whatever, or even knowing, so far as we are informed, that the *Bakers* were insolvent, and had absconded, or that there were any judgments and executions against the *Bakers*, *Gallagher*, without the assent of his partner, assigns the judgment, and enters into the guarantee, which is the subject of the present suit. Correctly to understand this case, it is necessary to transport ourselves back to the 11th of *December*, 1819, and discern if we can, the intention of the parties in the assignment. By the assignment, the bank became vested with the interest which *Gallagher* had in the judgment. They could, under their equitable interest, if they had chosen to do so, have proceeded to investigate the transactions, which had taken place before their interest accrued. They could have ruled the sheriff, or have brought suit against him, as the equitable owners of the judgment, and their rights would have been protected. They might also, in the name of *Fahnestock* and *Gallagher*, have maintained suit against *Aughenbaugh* and *Clippenger*, on the guarantee. In case of the insolvency of *Gallagher*, that would have been their only remedy, provided they were forced to resort to the guarantee. The question, however, is not what they might have done, but what they were bound to do. Did the Agricultural Bank suppose, that by the assignment they were bound to look to any other person than *Michael* and *William Baker*? Were any other persons in their contemplation, at that time? Was it the intention of the parties, that the bank should proceed against the sheriff, and unravel a transaction of some standing, or that they should commence suit against *Aughenbaugh* and *Clippenger*, in the name of *Fahnestock* and *Gallagher*? *Prima facie* it would appear to me, that that was not the understanding of *Gallagher* and the agents of the bank. In forming this opinion, it is a circumstance of no small weight that the money was made and in the hands of the sheriff, before the interest of the bank commenced, not on an execution issued on this judgment, but the money was collected on executions issued on other judgments, of which the bank, so far as we are informed, had no notice. There was no execution issued on the assigned judgment, and the bank, at the time of the assignment, should have had notice from *Gallagher* of the existence of the other judgments and executions against the *Bakers*. They will not be affected with implied notice. The

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guarantee of *Gallagher*, in the absence of all other facts, would be an engagement to pay the debt, on the failure of *Michael* and *William Baker* to do so. If, then, this were the state of the case, the *Bakers* being insolvent at the time of the assignment, or afterwards becoming so, and the bank not being bound to proceed against the sheriff, nor against *Aughenbaugh* and *Clippenger*, I should be of the opinion that *Gallagher* was liable on his guarantee.

If, however, both parties were aware, at the time of the assignment, that the property had been sold, and that there was money in the hands of the sheriff, applicable to this judgment, and that the *Bakers* were insolvent, then I should apprehend, it was their intention that the bank should proceed against the sheriff, before *Gallagher* was liable to the whole amount on his guarantee. It would be a defence to *Gallagher*, to the extent of the loss actually sustained.

The counsel for the plaintiffs have contended, that although the bank may not have been bound to have proceeded against the sheriff, yet they ought to have informed them of their determination, that they might have recourse to the guarantee of *Aughenbaugh* and *Clippenger*. That they were prevented from doing this, by the circumstance of the bank having the legal control of the judgment; and that they were solvent at that time, but are now insolvent. If the bank were only bound to look to the defendants in the judgment, and they were insolvent at the time of the assignment, the liability of *Gallagher*, commenced immediately. He should have taken care of himself, and cannot, I think, reasonably complain of the bank. If they had commenced suit, it would have been against himself. It had become an absolute undertaking, and no notice to him was necessary.

But suppose a suit had been brought against *Aughenbaugh* and *Clippenger*, could either *Gallagher* or the bank have recovered the whole amount of the judgment? They would have had a defence, most clearly to the extent of the money in the hands of the sheriff, applicable to this judgment. They would have had a right to complain that ordinary diligence had not been used by *Fahnestock* and *Gallagher*, in compelling the sheriff to pay over the money. They might with great propriety have said, that it was only necessary to have called on the sheriff, and the money would have been paid. And that, if not paid, it was their duty to have ruled the sheriff, or to have brought suit against him.

It may perhaps be important in another trial, to inquire whether any suit could have been sustained against *Aughenbaugh* and *Clippenger*, until there was some proceeding against the *Bakers*, and until some steps were taken to ascertain, and collect the money in the hands of the sheriff.

The parties to the assignment of the 23d of May, 1818, intended that something should be done before *Aughenbaugh* and *Clip-*

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penger were liable on their guarantee. At that time, the *Bakers* were owners of a considerable real and personal property, for it appears that their property was sold, between the 23d of *May*, 1818, and the 19th of *December*, 1819, when *Fahnestock* and *Gallagher* were the owners of the judgment, who do not appear to have taken any steps whatever to secure the payment of the money. I would not wish to be understood as saying, that a mere delay, although attended with loss, would discharge *Aughenbaugh* and *Clippenger*. If, however, at the time of the assignment, there had been gross negligence, it would be a discharge of the claim on the guarantee, to the extent of the loss sustained.

In the course of the trial, two bills of exception have been taken to the admission of evidence, each of which had been assigned for error in this court.

The evidence is objected to, in the first bill, on the ground that it is irrelevant. In the trial of a cause, it is sometimes difficult for the court to say whether it be irrelevant or not. It is a matter of some discretion with them, and when the evidence is admitted, I should be unwilling to reverse on that ground alone. If injury has been done, it may be corrected on a motion for a new trial. Although, after the evidence given of the sale of the lots, I cannot perceive the importance of the testimony, that would not be a sufficient reason, with me, to reverse the judgment.

The next exception, is to the admission of the evidence, which is intended to prove, that in 1819, 1820, and 1821, *Aughenbaugh* and *Clippenger* were solvent, and that at the time of the trial they were insolvent.

I cannot say, that this testimony was either irrelevant or incompetent. Its importance, however, will ultimately depend upon the facts proven in the next trial of the cause. And this leads me to consider the only remaining point. I cannot believe that the legislature ever intended to prohibit a transaction such as the one now presented to the court. I decide this cause, under its special circumstances, and would wish to be so understood. The Agricultural and Manufacturing Bank were about winding up their affairs, and for this purpose sold their banking house to the plaintiffs, and took in part payment this judgment, with the guarantee of *Gallagher*. The legislature did intend to prohibit a trading in bonds or judgments, or purchase of pre-existing debts, at a discount; a transaction, well understood, as a shaving of paper. This is against the manifest policy of the act, and a course of dealing of that kind would be attended with great danger to the public. But was this the case in the present instance? Neither of the parties had any intention of shaving this judgment. The bank was desirous of selling, and the plaintiffs of purchasing the banking house, and the assignment in question was a mere mode of payment, agreed upon between the parties. The bank had merely in view to close the concerns of the company. In this, I can

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perceive neither a violation of the letter or the spirit of the act of assembly. It would, in my opinion, be most manifestly unjust to permit this defence to avail *Gallagher*, by which he would be enabled to defraud the bank, to the amount of the value of the judgment.

Judgment reversed, and a *venire facias de novo* awarded.

[CHAMBERSBURG, OCTOBER 31, 1826.]

COMMONWEALTH, at the instance of POMPEY CRIBS,
against VANCE, gaoler.

HABEAS CORPUS.

The act of the 28th of *March*, 1788, requiring the occupation or profession of a possessor of a slave to be registered, is complied with by registering such possessor as an *esquire*, if he were an associate judge, though he was a farmer.

THE return to this *habeas corpus*, directed to *Samuel Vance*, the keeper of the gaol of *Franklin* county, at the instance of *Pompey Cribbs*, who was in the custody of the said keeper, was, that he held him as the servant, till the age of twenty-eight years, of *Lazarus Brown*. It was admitted, that *Pompey* was the son of *Grace*, a registered slave, the property of *James Maxwell*, and that the right of *Maxwell* had been transferred to *Brown*. And the question turned on the legality of the registry of *Pompey*, made by *Maxwell*, in the following words:—

“On the 6th day of *August*, in the year 1804, *Samuel Maxwell*, of *Montgomery* township, esq., appeared before me, and on his solemn oath returned a mulatto male child, his property, called *Pompey*, born on the 24th day of *February* last, to the best of his knowledge, to be recorded.

“*Edward Crawford*,
“Clerk of the peace of *Franklin* county.”

James Maxwell was a farmer, and an associate judge of *Franklin* county, and he had a nephew of the same name, who was also a farmer, and was not a judge or justice.

Findlay, for *Pompey*, contended that the office of associate judge is not an occupation such as the act of assembly requires to be specified in the registry. The occupation here was that of a farmer. *Purd. Dig.* 598. *Act of the 29th of March*, 1788. In 3 *Serg. & Rawle*, 399, where the registry was by *John Montgomery*, esq., parol evidence was given that he had no occupation. It lies on the master to prove his occupation. *Commonwealth v. Barker*, 11 *Serg. & Rawle*, 360.

(Commonwealth v. Vance.)

Chambers, contra.

When the master intends honestly to comply with the act of assembly, his act will be construed liberally. If this master had been called *farmer*, he would not have been distinguished from his nephew, also a farmer. He cited, 3 *Serg. & Rawle*, 398. 11 *Serg. & Rawle*, 360.

Dunlop, in reply.

The presumption is in favour of liberty. The words of the law are plain, and have not been complied with. An esquire is too general to identify an occupation or profession. Esquire is applied to the learned professions, to all judges, justices, clerks of courts, &c. It lies on the master to show he has complied with the act.

The opinion of the Chief Justice, and DUNCAN and HUSTON, Js., was delivered by

DUNCAN, J. The objection to this registry is the want of occupation of *James Maxwell*, the master, who was an associate justice of the Court of Common Pleas of *Franklin* county, and is described as *James Maxwell*, esq. The act requires the possessor of any child, born after the 1st of *March*, 1780, and who by the act for the gradual abolition of slavery, would have been liable to serve until the age of twenty-eight years, to declare before the 1st of *April*, 1789, or within six months after the birth of any such child, to the clerk of the sessions, &c., the name, surname, occupation, or profession of any such possessor, and of the county, township, district, or ward in which he resides, and the age, name, and sex of every such child, under the penalty of forfeiting and losing of every such child, and his becoming immediately free. This regulation is in the same words, as in the act for the gradual abolition of slavery.

This court is not now called on for the first time to give a construction to these enactments, and this objection itself has been considered and passed on very lately in this court, and I would not disturb these decisions after a contemporaneous and continued construction for nearly half a century. In a little while there will not remain any one who can be held either as slave or servant in this state, on account of his birth. These humane laws, so honourable to our state, recognize a property in the master as to slaves then in being, and the act of 1780 secures to the master the service of the child of his female slave until he is twenty-eight years of age. The act requiring their registry did not pass until 1788, and for the wise purpose of ascertaining that class of persons of colour from the children of free people of colour, prescribes a manner of registering intended only to identify the master and the child. Courts have not required a rigid adherence to the letter in the description of the master; for the owner of a slave entering his negro in the county where he lives without expressing the county

(Commonwealth v. Vance.)

in the registry, this registry has been held valid. *Cook v. Neff*, 3 *Yeates*, 259. So, in *The Commonwealth v. William Findlay, Esq.*, it was held that the registry of a negro as a slave, without adding for life, is good. 3 *Yeates*, 261. In both cases, there was a departure from the letter, though an adherence to the spirit of the law; and for this reason, because, as the court says, all the evils intended to be guarded against by the act for the gradual abolition of slavery, are prevented. In the case of *Belinda v. Wilson*, 3 *Serg. & Rawle*, 397, it was decided that the omission of the town and county in which the master resided, did not avoid the registry, if the slave were registered in the county in which the master resided; and in that case the occupation of the master was likewise omitted. He was described as esquire, and proof was admitted that the master had no occupation. There *Belinda* was discharged, because the sex was not inserted in the return, and there the Chief Justice observed, that he was not for shaking former decisions, and as far as they had gone they had become a rule of property, and to the extent now contended for by the master decisions have gone. In a case not yet reported, decided by the court in *September*, 1825,—*The Commonwealth ex relatione Annette, a mulatto Girl, v. John Irvine*,—the entry was by the possessor, *Heckart Wallace*, yeoman: held, that yeoman was a sufficient description. Yeoman is neither occupation nor possession; under the statute of addition, it is a good addition, and the most common one. *James Maxwell's* commission as an associate justice conferred on him the distinction of esquire. It was not a title conferred on him by courtesy, as it now is on almost every body. If it had been a registry by his name of office, associate justice, the same objection would have laid, viz. that it was not an occupation or profession. The legislature used these terms certainly in the very broadest and most general sense; but they well knew there were many holding slaves, who had neither occupation nor profession; many widows, many maiden ladies; besides many men of fortune who never had any occupation or profession, and many others who had retired from all business, and every occupation. It never was intended their slaves should be free, because they had neither occupation nor profession. Esquire would, with more certainty, designate this *James Maxwell*. Squire *Maxwell* was his general appellation in the county, not *James Maxwell*, farmer, where almost the occupation of the whole community was that of farmer. I have examined the returns in this county in the book of registry, and in every instance where the possessor was a justice of the peace and a farmer, his occupation of farmer is not inserted, but his legal addition esquire. In one case, where an attorney, while he continued at the bar, registered the children of his slave by his occupation or profession of attorney, yet when he was appointed President of the Court of Common Pleas he designated those born afterwards by his title of esquire.

(Commonwealth v. Vance.)

If description of the person was the design of the legislature, and they could have no other possible reason by the provision, *esquire*, the legal title, the name by which he was generally called and known would be more appropriate. By this name he would be distinguished from other *James Maxwells*, and certainly *esquire* is more descriptive of a person than *yeoman*, which has been held a sufficient description. *Esquire*, even in an act of attainder, would be a good addition and description, where the person attainted, by his commission was entitled to that appellation; and this case shows how much more certain this description of *esquire* is than *farmer*, for in this same township and county there is another *James Maxwell*, farmer.

It is the opinion of a majority of the court, that in the spirit of the former decisions on these acts of assembly, the return is legally registered, and he is remanded to the custody of his master.

GIBSON and ROGERS, Js., dissented.

Pompey remanded.

[CHAMBERSBURG, OCTOBER 31, 1826.]

In the case of WILLIAM HUFF'S Estate,—Appeal of
ROBERT PEEBLES.

APPEAL.

Where a will has been admitted to probate by the register, and the executor has acted under it, although the will be afterwards revoked, the accounts of such executors may be filed before the register, and presented to the Orphans' Court, and they are bound to make a decree in respect to them.

THIS case came up on the appeal of *Robert Peebles* from the decree of the Orphans' Court of *Cumberland* county.

The administration account of *Robert Peebles*, executor of *William Huff*, deceased, was examined and passed by the register of *Cumberland* county, on the 7th of *February*, 1825, and on the 11th of *May*, 1825, it was presented to the Orphans' Court for passage and confirmation, but the court refused to pass the same.

The reasons of the court were filed, according to the act of assembly, as follows:—

There was no legal probate of the will. Letters testamentary were erroneously procured by *Robert Peebles*, and in his own favour. They were revoked by the Orphans' Court. He now presents an account of his administration of the estate, which is complained of by the heirs, and urged as one of the causes of the propriety of revoking the letters testamentary. The heirs object to the passage of any account.

(Appeal of Robert Peebles.)

The acts of *Robert Peebles* in his own favour, under the letters testamentary so procured, are void; and the court is unwilling to recognise him as an executor. If he has any legal claims upon the estate, our refusal to confirm his account will not deprive him of his remedy: if he claims the equitable interference of the court, we can perceive no ground for such claim in any of the matters that have been presented to the court. "The probate, or, as it is sometimes called, the letters testamentary, may be revoked, either on a suit by citation, or on an appeal to reverse a sentence by which they are granted. And, in case of revocation, all the intermediate acts of the executor shall be void." *Toll. Law of Ex.* 78. 3 *Bac. Ab.* 50. *Tit. Ex. Adm. let. E.* 13. Although several previous cases are overruled in *Allen v. Priestman*, 3 *Durn. & East*, 125, on this subject, it rather confirms the doctrine, to the extent necessary to support the opinion of the court in this case.

Alexander, for the appellant, insisted that the Orphans' Court was bound to examine into the accounts, and decree upon them as in other cases of executors' accounts. The register had jurisdiction, and therefore his acts were not void, but voidable: and the acts of the executor, such as receipt of money from a debtor of the testator, are valid. He cited, 1 *Roll's. Ab.* 909. *Com. Rep.* 152, overruled in *Allen v. Dunbar*, 3 *Term Rep.* 125. 4 *Burr.* 1986, 2 *Com. Dig.* 50, 600. *Toll.* 76, 77, 78. 8 *Cranch*, 9. 3 *Bac. Ab.* 50. 6 *Co.* 19. *Cro. Eliz.* 459. 2 *Lord Ray.* 680. 3 *Bac. Ab.* 21. 12 *Mod.* 471. 5 *Co.* 30. 1 *Dessauss.* 213. 3 *Binn.* 622. 6 *Serg. & Rawle*, 452. 1 *Yeates*, 91. 3 *Yeates*, 511. 2 *Hen. & Munf.* 467, 485. 1 *Munf.* 456.

Penrose, contra, argued that an executor whose letters have been revoked, stands on the same ground as an executor *de son tort*, and hence he had no right to settle an account before the Orphans' Court or the register. If this executor can settle an account and show a balance in his favour, he may obtain a decree of sale of the real estate. All authority ceases on repeal of the letters. 3 *Bac. Ab.* 51, 52. *Toll. Ex.* 77. *Act of the 7th of March, 1813, Purd. Dig.* 610. *Act of the 4th of April, 1797. Ib.* 614.

The opinion of the court was delivered by

TILGHMAN, C. J. The register of wills for the county of *Cumberland*, admitted to probate a writing exhibited as the testament and last will of *William Huff*, deceased, and granted letters testamentary to *Robert Peebles*, the executor in the said writing named. These letters were afterwards revoked, because the probate was made on the oath of the said *Robert Peebles* and another person, who were the principal legatees. After the revocation, viz. on the 7th of *February, 1825*, *Peebles* exhibited an account of his administration to the register of wills, by whom it was examined and passed, and afterwards transmitted in the usual man-

(Appeal of Robert Peebles.)

ner to the Orphans' Court. That court, having considered the case, refused to pass any account of the administration of *Robert Peebles*, because there had been no legal probate of the will, and the letters testamentary had been revoked.

The register has power to take probate of wills of deceased persons, and there is no reason why the executor, to whom letters testamentary are issued, should not be accountable before him, though the letters be repealed. It is not true, as has been sometimes asserted, that all intermediate acts of the executor, between the probate and repeal are void. The payment of a just debt is not void. The estate is discharged by such payment, and the executor entitled to credit. But it is true, that the executor shall not be permitted to gain any preference or personal advantage. An executor to whom probate has been granted, differs from an executor *de son tort*. The former has acted under letters testamentary, from an officer who had jurisdiction in the case. The latter has never acted but under a usurped authority. An executor *de son tort*, therefore, cannot be cited to account before the register. It was said by the counsel for the appellees, that before *Peebles* exhibited his account, he had ceased to be an executor. But it does not follow, that he is not accountable. Temporary administration, *pendente lite*, and *durante minori ætate* of an executor, are often granted. Yet the person to whom this temporary power has been given, is accountable after it has expired. If the executor, in the case before the court, could have been cited to account before this register, he may account voluntarily. To say that he must wait for a citation, would be a most unreasonable doctrine; for then he would be compelled to be a delinquent, and as such subject to costs. It has been objected that *Peebles*, having obtained a probate improperly, ought not to derive any advantage from it. It is to be observed, that he is not charged with any fraudulent device or practices. The probate was illegal, because the witnesses were interested, and therefore incompetent. And, as to gaining an advantage, it does not appear that he will derive any advantage from the settlement of his account. Whether settled or not, he will be entitled to an allowance for debts of the testator fairly paid. And, if he sets up a debt due to himself, our law gives him no preference. That he should be subject to a citation, is no privilege to him, but a very great advantage to the creditors, and all persons interested in the estate of the intestate. On a citation, the proceedings are summary, and much more expeditious than actions at law. Another advantage is, that the accountant is put to his oath in order to charge himself, but cannot discharge himself without proof independent of his oath. An opinion was once entertained, that payments made to one who had obtained probate of a will, which was afterwards repealed, were void. And, in support of this principle, 1 *Roll. Ab.* 909, and *Com. Rep.* 152, were cited by the counsel for the appellees. But, on better

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consideration, these cases have been overruled. The granting of probate by the register of wills is a judicial act, and, while it remains in force, it cannot be contradicted. But the executor, it is objected, derives his authority from the *will*. He does so, but the probate, until annulled, being conclusive evidence of the existence of the will, a debtor cannot dispute it, and is therefore justified in making payment to the person who appears to be the executor. This is so plain and reasonable, and the contrary opinion so unjust and inconvenient, that one cannot but wonder it was ever held. In *Toller on Executors*, 76, 77, 78, the law will be found accurately laid down, except in one instance. Having shown, that payments made to the executor before the repeal of the probate, were valid, he says (page 78,) in case of revocation, all the intermediate costs of the executor shall be void. Now, this is a plain contradiction, unless it can be made out, that the receipt of money by an executor is not *an act*. Perhaps I went too far in saying, that the authority of the executor is derived from the *will*, and not from the probate. That is the general principle, but there certainly is some degree of authority conferred, indirectly, by the probate, because it is evidence *not to be contradicted*, that there is a will, and that the person named in it is the executor. A probate of a forged will of a *living person*, is indeed an absolute nullity; because the register has no jurisdiction, except in case of one who is dead. Such a probate, therefore, is distinguishable from one of a forged will, where the supposed testator is dead; for then the register has jurisdiction. It appears to me, that receipts of money by *Robert Peebles*, for the debts due to *William Huff*, and payments made by him of the just debts of *Huff*, while the probate and letters testamentary were in force, were lawful acts, in consequence of which he might be cited to settle an account before the register, or he might go in and settle it without citation. I am of opinion, therefore, that the Orphans' Court erred in refusing to examine the account presented to them by the register. Their decree is therefore to be reversed.

The record is to be remitted to the Orphans' Court, with orders to proceed to the examination of the account, and to pass a final decree thereon.

[CHAMBERSBURG, OCTOBER 26, 1826.]

HOWER *against* KRIDER.

IN ERROR.

The summons, in a proceeding under the landlord and tenant act, may be made returnable before the fourth day from its date.

WRIT of error to the Court of Common Pleas of *Cumberland* county, to remove the proceedings of that court on a *certiorari*, directed to two justices of the peace of the county, who returned their proceedings on a complaint by *John Krider*, as landlord, against *Jacob Hower*, as his tenant, by which the latter was removed from the premises he occupied.

Several errors in the proceedings of the justices were now assigned by *Penrose*, for the plaintiff in error: but the only one which was pressed in this court, was that the return of the summons was too short, it being issued on the 3d of *April*, 1824, returnable on the 5th of the same month.

Ramsey, contra.

The opinion of the court was delivered by

HUSTON, J. This is a writ of error, to reverse a decision of the Court of Common Pleas of *Cumberland* county, in which they affirmed the judgment of two justices of the peace, in a proceeding between landlord and tenant.

The only question here is, on that clause of the act of assembly, which directs that the summons issued by the two justices to the sheriff, to summon a jury, and to notify the lessee to appear, shall be returnable *within four days*. The counsel for the plaintiff insisted that this process could not be returnable before the fourth day, and read a note from *Bache's Manual*, (page 214,) where it is said Judge RUSH so decided. It was further insisted, that even four days was a very short time, within which to prepare for a trial.

The question is, what is the provision of the law?—I shall not undertake to reason on the meaning of the words, *within four days*. In common parlance they are well understood, and mean something different from, *not less than four days*, which is the meaning attempted to be offered to them. It is to be returnable, at the discretion of the justices, at any time not more than four days. When we recollect, that in all actions of debt or demand for money, not exceeding one hundred dollars, the process, unless the defendant is a freeholder, is returnable forthwith; when we recollect that three months' notice to the lessee must be proved, either to remove or be prepared for trial; and when we recollect that the

(Hower v. Krider.)

legislature preface the provision of the law, by a statement of the hardships which landlords had been subjected to by delay, we can hardly doubt, but that the words well express the intention of the legislature and were intended not to give any time to the lessee, but to ensure a speedy decision to the lessor. The 12th section of the act of the 10th of *March*, 1810, directs that the *scire facias* against a constable charged with misconduct on an execution, shall be returnable on a day to be mentioned, *not exceeding eight days* from the date of the *scire facias*. This is precisely equivalent to the phrase, within eight days,—and has never been construed to mean *not less than eight days*. There is no provision as to when the summons shall be served, as there is in several laws which were intended to give time to the person summoned. If, however, it should be made appear that a *material* witness existed whose attendance could be procured in a short time, and could not be had on the return day of the summons, it would be the duty of the justices to adjourn the case, that the witness might be procured. There is no allegation of any thing of this kind here.

Judgment affirmed.

[CHAMBERSBURG, OCTOBER 31, 1826.]

FULWEILER against BAUGHER and another.**IN ERROR.**

In suits on bonds, which were the consideration money of land sold, the parties agreed by writing filed in the cause, that the title was defective for part of the land, that the plaintiff was to deliver a good title, and that if a good title should be delivered, the defendant claimed a deduction of various items stated, and that the court should determine the legality of these claims, and auditors should settle the amount: *held*, that the court, after deciding that the plaintiff could not give a good title for two sevenths of the portion of the land in question, might set aside the agreement so far as to order a trial, and that their decision on the point was not a subject of a writ of error.

Payment of taxes due by the prior owner is a subject of deduction from the purchase money, if a lien; but not payment to a patentee for the use of a hopper boy, &c. to a mill, which were on it when bought, if the patent were void.

Where the title of a part of the land, for the purchase money of which the suit is brought is defective, evidence of the situation of a mill-dam, race, &c. on the property, is admissible to show the relative value of the part obtained, compared with that which is lost.

Married women may, jointly with their husbands, give a power of attorney to convey land in *Pennsylvania*, and, if duly acknowledged, the conveyance under it would be valid.

Ten years from the date of the power does not raise a presumption of the death of the principal, at the time when an attorney executes a conveyance under such power, where there is no removal of the principal from his former abode.

An act done by an attorney is valid, if it appears he did it as attorney, whether it be done in the principal's name or in the attorney's, as such.

If the warrantor, on notice by the vendee to come in and defend the title, neglects to do so, the verdict is conclusive against him. If the vendee does not give notice, but defends, he cannot recover his counsel fees, and his own expenses, unless in case of absence of the warrantor, or fraud.

WRIT of error to the Court of Common Pleas of *Cumberland* county.

This suit, with five others, was brought by *Daniel Baugher* and *John Crumbaugh*, executors of *Samuel Baugher*, deceased, who was assignee of *Peter Ikes*, who was assignee of *Philip Klinger*, against *Abraham Fulweiler*, surviving obligor in a bond dated the 8th of *June*, 1807, for the payment of one hundred pounds on the 30th of *August*, 1808. Plea, payment and *nil debet*: also a special plea, stating the failure of consideration. Replication, that he does owe, *non solvit* and issues.

On the 9th of *February*, 1820, an agreement was entered into by the parties, and filed of record, viz:—

The above suits are on bonds, which were part of the consideration of a tract of land bought by the defendant from *Philip Klinger* in 1807. The deed from *Klinger* contains a general warranty. For about seventy-eight acres of the best part of the said tract, *Klinger* had not a good title, and the title for the same is not now in the defendant. About eighteen or twenty acres of the said seventy-eight acres are cleared. Partial payments have been

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made on some of the bonds. Plaintiffs are to deliver to defendant a good title for the land mentioned in the deed from *Klinger*. The title to be approved of by the court. If a good title be delivered as above, the defendant then claims a deduction from the said bonds for the following reasons, and on the following accounts:—

1. The expenses incurred by defendant in and relative to the ejectment brought against him by *Mark Halfpenny* and others, and now pending. (*See post.*)

2. The expenses incurred by the defendant in and relative to the said six suits, and the costs, (other than the plaintiffs' bills of costs,) on the same.

3. The defendant paid to *Oliver Evans* and *Evan Evans*, or their agent, one hundred and twenty dollars for patent rights to a hopper boy and flour press, which were in the mill on the said lands when he bought the same from *Klinger*. He also paid taxes, (about five dollars and thirty cents,) on the said land, which were due before he bought the same.

4. The defendant, for want of a good title, was deprived of opportunities of selling the said land, when advantageous sales might have been made. He was prevented also from improving the land, as he would have done if the title had been indisputable. For these he claims damages, and a deduction from the said bonds.

The defendant alleges that he was ready and willing to pay the said bonds, when due, without suit, if a good title had been given to him: and he desires now to be placed in the same or as good a situation as he would have been, provided *Klinger* had given him a good title at the time of executing the deed. If interest be counted on the bonds, he claims interest on his expenses, and on the amount of damage sustained by him from time to time.

It is agreed, that the court determine whether all, or any, and which of the said grounds of deduction claimed by the defendant are, (if true,) legal off-sets, or ought in law to be deducted from the amount of the said bonds. The amount of the said off-sets or deductions to be ascertained and reported by three auditors, or a majority of them, to be appointed by the court. The said auditors to meet and proceed *ex parte*, on ten days' notice. The report, when approved of, to be final, and the balance to be paid by the defendant.

The total amount to be deducted, according to the said report, approved of as aforesaid, is to be deducted from the first bond; and if the sum reported exceeds the sum due on that bond, then the remainder to be deducted from the second, and so on.

The plaintiffs are to pay their own bills of costs in the said suits. Each party is to pay half of the auditors and prothonotary's fees, arising on this agreement or reference,—the plaintiffs to pay their own bill of costs arising on this agreement or reference.

The defendant's bill of costs and expenses on this agreement or

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reference, and accruing therefrom, to be estimated as damages, and included in No. 2, of the damages claimed by him; and subject, like that No., to the opinion of the court.

Dated and filed 9th of *February*, 1820.

The following was filed the 25th of *March*, 1824.

By the Court. The court being of opinion, on argument, that the title now tendered is defective, at least so far as regards the title of *Lydia Hollowell*, and *Ann Brown*, the agreement of the parties cannot now be carried into effect further. And, on motion of the plaintiffs, the agreement is now set aside, because it has become inoperative, cannot be carried into effect, and to suffer it to remain would be a perpetual bar to the plaintiffs' further proceeding, which would be manifestly unjust.

This opinion was filed, at the request of the defendant, who oppose the setting aside of the agreement.

And now, to wit, the 17th of *November*, 1824, this cause being ordered on for trial, the defendant objected to any jury being sworn, and produced and read the agreement of the parties, filed of record the 9th of *February*, 1820.

The court overruled the said objection and ordered a jury to be called and sworn,—to which the defendant excepted.

On the trial, the defendant offered in evidence a receipt for taxes assessed on one of the tracts included in the sale to the defendant, whilst it was unseated; and also receipts of *Oliver Evans* for money paid him on his claim as patentee, to the right of a hopper boy and flour press in the mill, when the property was sold. This evidence the plaintiffs objected to, and the court rejected it and sealed a bill of exceptions.

There was a grist mill situated on the property sold to the defendant, and the defendant offered to prove the situation of the mill, the dam, race, &c., and that by reason thereof the mill was of little value. This evidence the plaintiffs objected to, and the court overruled it and sealed a bill of exceptions.

The title to the seventy-eight acres was traced back to a certain *Thomas Bye*, who, on the 7th of *March*, 1808, conveyed to his seven daughters. On the 1st of *June*, 1812, these daughters, and the husbands of such of them as were married, joined in a power of attorney to three persons (one of whom was *A. Brown*,) or any one of them, to sell and convey this tract. *Brown* conveyed to *William Ramsey* on the 10th of *March*, 1823. He signed the names of the principals to the deeds and affixed their seals, and, among others, that of his own wife, *Ann Brown*. The name of one other of them, *Lydia Hollowell*, a married woman, was interlined wherever it occurred in the acknowledgment of the power. The power was duly acknowledged by the principals, and the acknowledgment of the married daughters was in the form prescribed by the act of assembly. After *Brown* had executed the deed to *Ramsey* for his principals, he acknowledged it as attor-

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ney for the said, (naming all his principals,) to be his act and deed. On the 23d of *March*, 1824, *William Ramsey* conveyed the seventy-eight acres in question to the plaintiff. This evidence was objected to by the defendant and admitted, and the defendant excepted.

The next bill of exceptions by the defendant was to the court's rejecting evidence of the expense of the defendant in certain ejectments brought for the recovery of the seventy-eight acres, one of which was discontinued immediately before the trial of this cause, and after *Ramsey* made his release to defendant.

The defendant then proposed the following points, for the instruction of the court to the jury:—

1. That unless the defendant has a good and indubitable title in law and equity for all the property, for the price whereof the bond in question was given, he has a good defence in this suit to the amount of the full value of the deficiency, and the damage he may have sustained by reason of the defect.

Answer. As the defence is of an *equitable* and not a *legal* kind: as the defendant, if the evidence is true, took possession according to the terms of his purchase, and has held the same ever since, except as to sixty acres, which he sold for a larger sum of money, including the mill, and, as he has thus put it out of his power to rescind the contract, we say that a good equitable title would avoid the defendant's defence. If he has not got either an *equitable* or *legal* title to all the property for the price of which the bond in question was given, he has a good defence in this suit to the amount of the value of any deficiency, and such damages as he may have sustained by reason of the defect.

2. That *Philip Klinger* could acquire no right to the land in dispute by a settlement and warrant subsequent to the warrant and survey of *Halfpenny*.

Answer. *Klinger* could acquire a right to the land in dispute by a settlement and warrant subsequent to the warrant and survey of *H.*, twenty-one years' actual adverse possession would give such right.

3. That the warrant of *K.* is void, unless he actually and *bona fide* resided on the land at the time.

Answer. The warrant of *K.* would be void, if he had no actual residence upon it at the time.

4. That the agreement filed in this cause, admits that the defendant, at its date, had no title to the seventy-eight acres in dispute, and unless the plaintiffs have proved that they have now given him a good legal and equitable title to the same in severalty, the defendant has a good defence, as stated in the first point.

Answer. The agreement filed in this cause was read without opposition, and it admits that the defendant, at its date, had not a good title to the seventy-eight acres in dispute.

5. That the married woman, mentioned in the alleged power of

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attorney of the 1st of *June*, 1812, could give no valid authority to their husbands to sell their real estate.

Answer. This position is true, as stated.

6. That the legal presumption is, that the interlineations in the alleged acknowledgment of the said power of attorney were made after its attestation; and, unless this presumption is rebutted and removed by other evidence, the whole is void, and of no effect, and no title depending on it can be good.

Answer. This position is true, as stated.

7. That if no proof has been given, to satisfy the jury of the continuance of the lives of all or any of the constituents in the said power, within seven years before the date of the deed of the 10th of *March*, 1823, they shall be presumed to be dead, and the said deed can therefore convey no title.

Answer. If the attorney was not advised of the death of any of the constituents, and executed the deed legally and *bona fide*, the presumption of death does not arise so as to defeat the deed. We see nothing in the evidence, authorizing the court to state that there is a legal presumption of death. If the defendant relied upon it, he would have been permitted to prove it.

8. *Aaron Eastburn*, *Thomas Hallowell*, and *Abraham Brown* had but life estates in the land in question, and could not convey the same in fee simple.

Answer. This position is true, as stated.

9. That the deed of the 10th of *March*, 1823, is not proved or acknowledged in such way as to vest any title, but the life estate of *Abraham Brown*, in *William Ramsey*.

Answer. We cannot say, that in law the deed of the 10th of *March*, 1823, only vests the life estate of *Abraham Brown* in *William Ramsey*.

10. That the defendant is not bound to take a doubtful, suspicious, or partial title; and if none other, or no title is now given to him, he is entitled to a deduction from the bonds yet unpaid, to the amount of the full relative value of such land, as well as for damages the residue of the land has sustained by reason of the defect.

Answer. When one man sells to another a tract of land, and covenants to give a good title, the purchaser is not bound to take a doubtful, suspicious, or partial title. But if the purchaser accept the title offered, enter into possession, enjoys the property for a number of years, sells a valuable portion of it for a larger sum, so as to put it out of the vendor's power to rescind the contract, the same rule will not apply in all its strictness. In a case where a purchaser is in possession of the whole, has accepted a deed for the whole, perhaps not likely ever to be disturbed in his possession, having a good title to the larger portion, and the lapse of a few years promising to confirm the whole by operation of the statute of limitations,—would it be fair, under such circumstances.

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to say he shall hold his doubtful title, which may be as good as an unimpeachable legal title to him: no one likely to disturb him in it; no one contending with him for it; would it be fair, under such circumstances, to say he must have his title perfected to every part, beyond suspicion and beyond possible impeachment, or have a deduction from the bonds unpaid, to the amount of the full relative value of the whole of the land, the title of which may be doubtful, as well as for the damages which the residue of the land might have sustained by the loss of a part. If such were the law, a man might hold all the land he purchased under a doubtful title, and refuse to pay any thing for it. The real loss the purchaser has, and is likely to sustain by reason of the defect, is a proper subject of deduction. The amount a jury is called on to fix, under all the evidence.

11. That if the jury find that *William Ramsey* had no warrant of attorney from the plaintiffs, that he only marked his name as attorney for the plaintiffs at the bar, and after the jury were sworn in this case, and that not he, but all or some of the other plaintiffs, had a right to recover in the ejectment No. 131, *November, 1816*, he had no right to discontinue the same; said discontinuance would not conclude said plaintiffs: but on motion by them, and said facts appearing, the court would strike off said discontinuance and reinstate the suit.

Answer. By the ordinary and daily practice of courts, we recognise the acts of counsel without their exhibiting a warrant for their appearance. They are officers of the court, and responsible for their conduct. Mr. *Ramsey* being named as a party, and having entered his name as counsel of record and discontinued the suit, it is *prima facie* a valid act. And I cannot conceive that any court would strike off the discontinuance, after its having been expressly done to facilitate the recovery in the present suit against the defendant. It would be a fraud upon the defendant to do so.

12. That if the land has been unimproved in part, and the want of title has prevented the defendant from having the benefit thereof, by improvement and farming the same, if the jury should find against him on the other points, he is not liable to pay interest on the bond.

Answer. The usual rule with regard to interest is, that when the purchaser accepts a deed, and enters into possession, and enjoys the land, if he withhold the purchase money even on pretence of defect of title, and if the vendor ultimately recover the purchase money, interest is recoverable also. We cannot inquire into the exact profits of the land, and the precise extent to which the purchaser employed it; to ascertain which, the *interest* or the *profits* would exceed in value. We must frequently be governed by more general rules. I cannot say the rule is absolute in this way; but it would require strong evidence to take a case out of it. A party

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can always stay interest, by tendering the amount of the claim due, and holding it ready for payment, when it can be properly made.

13. That if a good title has never been given or offered to the defendant, until the cause came on for trial, the jury have a right to allow the defendant a compensation for his loss of time, trouble, and expense, independently of the legal costs and attorney fees.

Answer. The fixing a rule or measure of deduction from the plaintiff's claim, involves various difficulties. The defendant took a general warranty in his deed from *K.* It is in proof that *K.* is insolvent. It also appears that since the date of the deed, ejectments have been brought against the defendant for part of the land embraced in it, one of which was tried and the other discontinued to day. Under these circumstances, the law would be unjust, if it would not suffer the defendant to claim a deduction out of his bonds, if the title is actually defective, to the whole or a part. There has been no eviction, but it is not denied that the title was defective at the bringing of the suit. At that time, then, the defendant had an equitable defence. This suit was instituted in 1809. The statute of limitations had not then run out as to the seventy-eight acres; or any part of it; consequently, the outstanding title of *M. H.*, as to that quantity, was to be preferred. The bond, when suit brought, would be about two hundred and sixty-six dollars and sixty-seven cents, sixty dollars having been paid the 31st of March, 1809. The seventy-eight acres, at the average price given for the whole, would amount to about six hundred and eighteen dollars; three hundred and fifty dollars and upwards more than the plaintiffs claim in the present suit. If this view is correct, when this suit was brought, *F.* had an equitable defence to the whole claim; and, if so, we advise the jury, if they find for the plaintiff, to make their verdict subject to the payment or deduction of the legal costs on parts of this suit.

Although such equitable defence may have existed, when the suit was brought, still, if since that period that defence has been avoided, by the transfer of those holding under *M. H.* to *Ramsey*, and a tender of a deed from him to the present defendant, or by the operation of the statute of limitations, then the plaintiff would be entitled to recover, agreeably to the rules we have stated.

If no fraud existed in the contract between *K.* and *F.*, and there is still an outstanding adverse title, better than the one offered to or held by the defendant, he would be entitled to a fair indemnity for the value of the part for which he got no title. But I cannot see how he can legally be allowed "a compensation for his loss of time, trouble and expense," except the costs of suit, subject to which we have, in a certain event, recommended you to find your verdict. If there was fraud on the part of *K.* in the

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contract, he should be made responsible for his fraud, to the whole extent of the injury effected by it.

To these answers the defendant excepted.

Parker and Alexander, for the plaintiff in error.

Carothers and Mahon, contra.

The opinion of the court was delivered by

HUSTON, J. This suit was brought against *Fulweiler* and his sureties, on a bond dated the 8th of *June*, 1807, for the payment of one hundred pounds on the 30th of *August*, 1808. Pleas, payment, &c. *nil debet*, and a special plea stating the failure of consideration. Replication and issues. There were five other suits between the same parties on other bonds.

On the 9th of *February*, 1820, an agreement was entered into by the parties, and filed of record in the cause.

The above suits are on bonds, which were part of the consideration of a tract of land bought by the defendant from *P. Klinger*, in 1807. The deed from *Klinger* contained a general warranty. For about seventy-eight acres of the best part of the said land, *Klinger* had not a good title, and the title for the same is not now in the defendant. About eighteen or twenty acres of the said seventy-eight acres are cleared. Partial payments have been made on some of the bonds. The plaintiffs are to deliver to the defendant a good title for the land mentioned in the deed from *Klinger*; the title to be approved of by the court. If a good title be delivered, as above, the defendant claims a deduction from the said bonds, for the following reasons and on the following accounts:—

[Here follows a specification of the grounds of defence.]

The agreement proceeds thus: It is agreed that the court determine whether all, or any, and which of the said grounds of deduction claimed by the defendant are, if true, legal off-sets, or ought in law to be deducted from the amount of the said bonds. The amount of said off-sets or deductions to be ascertained by three auditors, or a majority of them, to be appointed by the court." Several other provisions follow, among which are some agreements relating to the manner in which the costs of the said suits are to be paid.

On the 25th of *March*, 1824, the following proceedings appear in this cause:—

By the Court. The court being of opinion, on argument, that the title now tendered is defective, at least so far as regards the title of *Lydia Hollowell* and *Ann Brown*, the agreement of the parties cannot now be carried into effect further. And, on motion of the plaintiffs, the agreement is now set aside, because it has become inoperative, cannot be carried into effect, and to suffer it to remain, would be a perpetual bar to the plaintiff's proceeding, which would be manifestly unjust.

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The above opinion was filed, at the request of the defendants' counsel, who opposes setting aside the agreement. And the defendants' counsel afterwards objected to the jury being sworn, alleging the agreement to be in force, and that the court could not set it aside.

The above proceedings formed the subject of the first error.

The agreement consists of an admission of certain facts, and of a submission of the cause to be decided in a way and on terms different from the ordinary course of trial by jury. It would seem, the first part, the agreement to certain facts stated, was not considered as at all impaired by the decision of the cause; for it was read at the trial, and considered by the court as an admission of those facts, and was rightly so read and considered. As to that part of it, the court could not exercise any power over it, and, as I take it, did not. It may be, that if an agreement admits facts, the party may be permitted to show he did so under the influence of mistake or surprise. Unless this is done, an admission of facts in a cause on the record, would not be struck off that record by the court. It would seem the true meaning of the order of the court, was to strike off the submission of the determination of the cause to the court, and to arbitrators, and to relieve the plaintiffs from that part of the agreement which would tie up the plaintiff, until he got a title to the whole of the land sold.

The whole land sold was more than six hundred acres, the part of which the title was defective was originally seventy-eight acres. This belonged to seven co-heiresses of *Thomas Bye*, and from five of these the defendant obtained a conveyance. The shares of *Lydia Hallowell* and *Ann Brown*, two of the seven, were outstanding. There was then a hardship, perhaps injustice, in depriving the plaintiffs of the price of the whole seventy-eight acres, because a title to two-sevenths could not be obtained. But it is said the plaintiffs might, for aught that appears, have procured the title to those two shares. Of this, we think the court below were the proper judges, and that their decision on this point is not the subject of a writ of error. The case comes within a principle often decided in this court, and is not stronger than refusing a new trial, which is not to be reversed on error, though even we should think a new trial ought to have been granted. That court has decided, that the agreement, in this particular, ought not now to be carried into effect; and they were right in considering it as the agreement of the plaintiff to obtain and give to the defendant a good title for the whole, *if it was in their power to do so*.

After the jury was sworn, several exceptions were taken as to evidence, and several are here taken to the charge of the court.

1. The defendant offered in evidence a receipt for taxes assessed on one of the tracts included in the sale to the defendant, while it was unseated; and also receipts of *Oliver Evans* for money paid

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him on his claim as patentee of the right to a hopper boy and flour press in the mill when the property was sold, &c.

There is some uncertainty as to the first. The plaintiff's counsel say the receipt for taxes was given in evidence, and admit it ought to be, if it was for taxes left unpaid by *Klinger* on one of the tracts while unseated, and the bill of exceptions is in this respect vague. It ought to have been admitted, if it was a lien; and the other receipts for money paid to *Evans* as clearly ought not to have been, and were rightly rejected, because no patent to *Evans* was shown: and the money was paid voluntarily, and it is conceded to have been decided that *Evans's* patent was void.

2. On the property sold to the defendant was a grist mill. The defendant offered to prove the situation of the mill, the dam, race, &c., and that by reason thereof, the mill was of little value. This was rejected,—and it clearly ought to have been admitted. The defendant did not ask the contract to be rescinded, because there was a defect of title as to a small part. He keeps the property, and is entitled to an abatement of the purchase money, in proportion to the part which he does not get. That proportion can only be ascertained by proving the relative value of it, compared with what he does get, and this is ascertained by going into particulars; that is, the value of each part. The mill, at the time of the sale, might have been of value equal to all the land sold with it, or only of value equal to one-tenth or one-twentieth of the whole property sold. It seems to me, that in the hurry of a trial, it did not strike the mind of the judge, as offered for this purpose, or he would have admitted it. In his charge to the jury, he states the law as it is settled; viz. that the deduction of price is to be determined by comparing the value of the land lost, with that of the property to which he got a good title, and which he retains. The evidence offered was proper, and ought to have been received, and there was error in rejecting it.

The title to the seventy-eight acres before mentioned was traced to a certain *Thomas Bye*, who, on the 7th of *March*, 1808, conveyed it to his seven daughters, on the 1st of *June*, 1812. These daughters, and the husbands of such of them as were married, joined in a power of attorney to three persons, (one of whom was *Ann Brown*,) or any one of them, to sell and convey this tract. *Brown* conveyed this tract, and duly executed a conveyance to *William Ramsey* on the 10th of *March*, 1823. He signed the names of the principals to the deed, and affixed their seals, and, among others, that of his own wife, *Ann Brown*. The name of *Lydia Hollowell*, one of them, and a married woman, was interlined, wherever it occurred, in the acknowledgment of the power. The power was duly acknowledged by the principals, and the acknowledgment of the married daughter was in the form prescribed by the act, for passing the estates of married women. After *Brown* had executed the deed to *Ramsey* for his principal, he

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acknowledged it as attorney for the said, (naming all his principals,) to be his act and deed. On the 23d of *March*, 1824, *William Ramsey* conveyed the seventy-eight acres in question to the plaintiff.

All this evidence was objected to and admitted, and the effect of it, when admitted, formed the subject of exception to the charge of the court. That married women may, jointly with their husbands, give a power to convey lands, and that such power, when acknowledged in the manner prescribed by the act of assembly for passing the estate of married women, will be good, has been heretofore decided in this court. If it were not, it would unsettle many estates.

The power was not executed by the attorney for more than ten years after its date, and the counsel insisted the principals must be supposed dead. In those cases where that presumption is admitted, it is coupled with the circumstance that the person has removed from his former place of abode, and not been heard of for seven years. No removal—no inquiry was alleged here.

But the acknowledgment is objected to. There are some cases to be found, where much strictness would seem to be required in the forms of those conveyances by attorneys. But in *Coombe's Case*, 9 Co. Rep. 76, 77, the court put it on the ground that the act is good, if it appears that he did it as attorney, and that it is immaterial whether it is stated. The principal, by his attorney, does the act, or the attorney, as attorney for the principal, does the act. The difference is form, and nothing but form.

There is no error in this part of the case.

The next error assigned, is to the court rejecting evidence of the expense of the defendant in certain ejectments, brought for the recovery of this seventy-eight acres, one of which was discontinued immediately before the trial of this cause, and after *Ramsey* made his release to the defendant. I understand expenses as something distinct from legal costs, which I understand the court in a subsequent part of the cause to say, are to be allowed to the defendant.

When a man purchases, and has a general warranty in his deed, he may, when ejectment is brought against him for the land, or a part of it, give notice to the warrantor to appear and defend the suit. And if notice is duly given, and he does not defend, the record of the recovery is conclusive evidence against him, in an action of covenant on the warranty. If the vendee does not give notice, but appears and defends, it has not been allowed him to recover his counsel fees paid, and his own expenses; for there may be no ground of defence, and he shall not subject his vendor, without his knowledge and against his will, to more than he is liable to on his covenant of warranty. This, generally. There may possibly be exceptions, where the warrantor has left the state, and expense must be incurred before he can be found, and notice served;

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or in cases of fraud in the warrantor. For any thing appearing in this record, the court was right.

Thirteen points were submitted to the court below, on which they were required to deliver opinions to the jury.

I do not mean any reflection on the counsel in this cause particularly; but the practice, under the act requiring the judge to reduce his opinion to writing, is becoming a grievance. The counsel knows the points on which his cause must turn, and may properly request an explicit opinion on those points. It cannot, however, conduce to the advancement of justice, to subdivide these points *ad infinitum*, or to require a written opinion on every point having the most remote connexion with any part of the evidence, and sometimes having no connexion with the matter trying. Errors are assigned here;—on some of these, the opinion given suffices. I proceed to notice the others.

The second point submitted to the court below was, “that *Philip Klinger* could acquire no right to the land in dispute, (the seventy-eight acres,) by a settlement and warrant subsequent to the warrant and survey of *Mark Halfpenny*, (the title of *Thomas Bye*.) Whether he could or not might depend on many matters, and on whether the statute of limitations came to his aid. But to answer it was not necessary in this cause; for it was admitted on record, by the agreement filed, that *Klinger* did not acquire any right by his warrant and settlement, nor until he purchased five-sevenths of the warrant in the name of *Mark Halfpenny*; and the only matter trying was what, under all the circumstances of this case, should be deducted from the purchase money on account of the two-sevenths, which were not conveyed to *Philip Klinger* under the title to *Mark Halfpenny*.

Exception has been taken, that the fourth position was not fully answered; but it was fully answered, taking into view the answer to the first point, and it was not necessary to repeat what was there said. The act does not require a judge to file an opinion on the same point more than once in the same cause; and if an answer is found in any part of the opinion filed, he need not repeat it.

The next error assigned, not before noticed, is in the answer to the tenth point, near the close of it, where the court say, “The real loss the purchaser has or is likely to sustain by reason of the defect, is a proper subject of deduction,—the amount a jury is called on to fix, under all the circumstances.” The phrase, *is likely to sustain*—is objected to, and it would have been better omitted. The plaintiff had procured the reference to be struck off, because he could not obtain the shares of those two married women. He asks the cause to be tried while those shares are outstanding. They must then be taken as lost to the defendant; they are valid subsisting rights. It will not do for the plaintiff to admit this, all through his cause, and at the close of it say perhaps, they

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they will never claim them, and therefore you must not be allowed for them. I am not sure the judge meant what is alleged now to have been his meaning. I incline to believe these words slipped into the charge inadvertently.

The court below having stated that the jury might, and in a certain view of the cause advised the jury, to deduct the costs up to a certain point in this cause, and his legal costs in the ejectment, the only point remaining is as to the interest. The answer of the court on this point is right as far as it goes. It is objected that it does not meet the case trying: perhaps it might have been put more explicitly in the point submitted to the court.

In this case the defence is, want of title to a part;—that still exists, and the plaintiff admits he cannot give it. It is then like the case where part is recovered from the vendee by adverse title; in which case the price of that part, in proportion to the residue, is to be deducted from the bond, before any interest is calculated on the bond. But to this there may be an exception, if the vendee has enjoyed the land during the time interest is demanded; and this is a matter of evidence, and to be submitted to the jury.

But for rejecting the evidence of notice, &c., the judgment is reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[CHAMBERSBURG, OCTOBER 31, 1826.]

M'COY and another, Appellants, *against* PORTER and others,
Executors of PORTER, Appellees.

APPEAL.

After a lapse of six years, with other circumstances, executors settling an account in the office, charging themselves jointly, are not allowed to settle separate administration accounts, whereby some of them are discharged as to creditors.

THIS case was argued by *Alexander*, for the appellants, and *Carothers*, for the appellees.

The opinion of the court was delivered by

TILGHMAN, C. J. This is an appeal from a decree of the Orphans' Court of *Cumberland* county, on the settlement of the administration account of *Ann Porter*, *Abraham Adams*, and *Caleb North*, executors of the testament and last will of *Robert Porter*, deceased. The executors settled a former account, in which they charged themselves jointly with the whole personal estate of their testator, and the Orphans' Court decreed that there was a balance

(McCoy's Appeal.)

due from them, amounting to three thousand five hundred and seventy dollars and fifty-eight cents. This decree bears date on the 15th of *September*, 1819. Afterwards, on the 11th of *February*, 1825, the Orphans' Court issued a citation against the executors, to appear on the 10th of *May* following, and settle a supplementary account. In consequence of this citation, the three executors appeared and settled separate accounts, which are the subject of this appeal. The main question is, whether the Orphans' Court acted correctly, in opening the first account, in which the executors were all charged jointly, and permitting them to settle separate accounts, by which two of them were discharged from almost the whole of the balance of the first account, leaving only *Ann Porter* chargeable. The appellants are creditors, who consider themselves in danger, if *Adams* and *North* are discharged. The ground on which the executors rely, for the settlement of separate accounts, is, that they are only liable for their own acts respectively, and not jointly, or each for the others. This is certainly the general principle, but it does not follow that they may not consent to charge themselves jointly, or that the law will not charge them jointly, where all have assented to the act of one, or where all have been culpably negligent in suffering one to take possession and dispose of the estate. In the case before us, the testator's personal estate consisted of cash, household goods, store goods and merchandise, book debts and bond debts. His wife, *Ann*, one of the executors, had a daughter of the name of *Margaret Steel*; and almost the whole of the personal estate was specifically bequeathed to the wife and her said daughter, and a granddaughter of the testator's named *Eliza Steel*, and to the children of the testator by a former wife. Immediately on his death, the wife took possession of the household and store goods, and continued to carry on the business of store-keeping for some time, buying new goods occasionally, to keep up the stock. Finally, she sold the whole of the goods on hand to *Benjamin* and *Henry Lease*, and took their bonds for the purchase money. The executors all resided in *Millerstown*, and one of them (*Adams*,) lived with the widow *Porter*, until the autumn succeeding his marriage with her daughter *Margaret Steel*, when he removed to his own house, and Mrs. *Porter* went with him, carrying her household goods along with her. It was in proof, that within a few months after the death of the testator, the executors all had notice of a claim against the estate, which might eventually sweep away a great part. The testator had, in his lifetime, sold a house and lot in *Lewistown* for two thousand dollars to *Joseph Martin*, and had given bond, with *Robert Porter*, jr., and *John Vance*, his securities, on condition that in case *Morton*, his heirs or assigns, should be evicted, the obligor should refund all money paid to him on account of the said house and lot, with interest, and all costs of suit and counsel fees expended by *Martin* in the course of his de-

(M'Coy's Appeal.)

fence. *Martin* sold this property to *M'Coy* and others, against whom an ejectment was brought to *August* Term, 1817, by the heirs of *George Porter*, who obtained a verdict and judgment in *May*, 1823. During the pendency of this ejectment, all the executors were consulted by the tenants, and gave their opinion as to the employment of counsel, &c. After the eviction, an action was brought in the name of *Martin*, for the use of *M'Coy*, against the executors of *Robert Porter* (the assignees) on the before-mentioned bond of indemnity, and judgment was obtained against them in *February*, 1824, for three thousand six hundred and fifty-eight dollars and three and a half cents. *Vance*, the security of the testator, is dead, and his executor, *James Creswell*, together with *M'Coy*, are the persons who appealed from the decree of the Orphans' Court. If that decree stands, they may be much injured, as it is uncertain what are the circumstances of *Ann Porter*, the only person to whom they will have to look for indemnity.

It was, to say the least of it, an act of great imprudence in the other executors, to suffer the widow to take possession, and have the disposition of almost the whole of the personal estate, without giving security; especially as they must have known that she continued to keep a store, and was liable to all the perils attending that occupation. A moment's reflection ought to have satisfied them, that the property of their testator was in danger. They were probably sensible of this, and the consciousness of their having acted in concert with *Mrs. Porter*, may have been the reason of their settling a joint administration account, thereby subjecting themselves to the hazard which they had brought upon the estate. It is evident that both before, and after the settlement of the first administration account, both *Adams* and *North* considered themselves responsible, because they took a refunding bond from *Eliza Steel* on the 11th of *June*, 1817, before they suffered her to take possession of her share, (one fourth) of the store goods bequeathed to her by the testator, and then in the hands of his widow, and another refunding bond from *Thomas Cochran*, on the 17th of *April*, 1821, for a specific legacy of one hundred and fifty dollars, bequeathed to his son *Robert*. There is no reason to think, that any of the executors were ignorant of the nature, or consequences of a joint account. It is unnecessary to say, whether, under the circumstances of the case, all the executors had rendered themselves responsible for the paper which went into the hands of *Ann Porter*, independently of the settlement of the first administration account. But it is very clear, that, taking that settlement into consideration, with the other circumstances, the executors should not be permitted, after the lapse of six years, to open the account, and so entirely to alter its nature, as to take off all responsibility from two of them. I do not say, that if after the settlement of a joint account, the executors should in a short and reasonable time, satisfy the Orphans' Court that they had acted under a misappre-

(M'Coy's Appeal.)

hension, that court would not have power to relieve them. But six years is an unreasonable time. Even four years was thought too long a period in the case of *Metz's Appeal*, 11 *Serg. & Rawle*, 204. The executors acquiesced in the decree made on their first settlement, and it is remarkable that the subject would not have been taken up again, had it not been for a citation, at the instance of the creditors, to compel them to the settlement of a supplementary account. I presume it was supposed by the creditors, that assets had come to the hands of the executors, after their first settlement. Otherwise it would have been much better for them to proceed, under the act of the 1st of *April*, 1823, *Purd. Dig.* 619, by virtue of which they might have filed a transcript of the decree among the records of the Court of Common Pleas of *Cumberland* county, whereupon each creditor might have instituted an action of debt, or issued a *scire facias* for the recovery of his debt. I am of opinion, on the whole, that the last decree of the Orphans' Court should be reversed, and a new account stated by the prothonotary of this court, wherein the executors shall be charged jointly with the balance decreed against them on their first settlement, and allowed for all payments of debts due from the deceased, made since that settlement, and all debts due to him, wherewith they had charged themselves, and which have been found to be irrecoverable. But no allowance is to be made for the payment of any legacy, specific or pecuniary; such payments being improper to introduce into an administration account. If either party objects to any item of charge or discharge, stated by the prothonotary, it is to be referred to this court, who will decide upon it before their final decree. The question of interest is referred for future consideration.

[CHAMBERSBURG, OCTOBER 26, 1826.]

MORRISON *against* MORELAND.

IN ERROR.

- A declaration stating a cause of action, though informally drawn, is cured by verdict.
- A set-off can only be of a payment made before suit brought—but if the plaintiff directs the defendant to make a payment, and agrees it shall be a set-off, the courts, under their equitable jurisdiction, will allow it.
- A levy by a constable on defendant's goods, for a debt of the plaintiff's, in which he was bail, removed by the creditor and the goods released, does not constitute a set-off.
- A paper will not be allowed to go to the jury, containing a statement of items, of some of which there is no proof.
- The President of the Court of Common Pleas is not bound to file his reasons in writing for rejecting evidence.
- Competency of evidence.

WRIT of error to the Court of Common Pleas of *Perry* county, in an action on the case brought by *John Moreland*, the defendant in error and plaintiff below, against *James Morrison*, the plaintiff in error and defendant below, in which there were a verdict and judgment in that court for the plaintiff.

The declaration complained that *James Morrison*, on the 14th day of *May*, 1818, at the said county of *Perry*, in consideration that the said *John Moreland*, at the request of the said *James*, by a certain writing under the said *John Moreland's* hand, had assigned to the said *James Morrison* a certain bond debt of four hundred dollars in the penalty of eight hundred dollars due to the said *John Moreland* from one *Thomas Craighead*, promised the plaintiff to pay him four hundred dollars on the said 14th day of *May*, 1818, and the said *John* averred, that trusting to said *James's* promise, at his request, he the said *John* did assign said bond debt to the said *James*, and the said *James* promised to pay as aforesaid. Yet the said *James*, though often requested, hath not paid the said sum.

Errors were now assigned by the plaintiff in error in the declaration, and, in the opinion of the court below on several matters, and were argued by

Alexander, for the plaintiff in error, and
Penrose, contra.

The opinion of the court was delivered by

HUSTON, J. To the decisions of the court, at the trial of this cause, several bills of exception were taken, and in this court errors were assigned up to the number of nine.

The first error here is to the declaration of the plaintiff. *John Moreland*, the plaintiff below, had been the owner of a bond on

(Morrison v. Moreland.)

Craighead. This he assigned to *James Morrison*, the defendant below. The bond was for eight hundred dollars, conditioned to pay four hundred dollars. The parties would seem to have placed great confidence in each other, or to have been unacquainted with the forms of business; for *Morrison*, when he received the bond with the assignment, barely engaged to pay *Moreland* four hundred dollars for it, but gave no memorandum to evidence that he had received it, or that he was to pay any thing for it. The statement or declaration of the plaintiff set out the transfer of the bond by *Moreland* to *Morrison*, and the amount due on it, &c. &c.; but omitted to give the date of the bond, and was in other respects rather deficient in form. No objection, however, was taken in the court below to this *narr.*, nor was any of the evidence objected to, because not applicable to the plaintiff's declaration; but after a tedious trial on the merits, this court is asked to set aside the whole, and send the parties to begin anew, on account of the alleged defect of this declaration. Our act of 1806 provides, that even during the trial a declaration may be amended, on certain conditions and under certain restrictions. This act does not, however, repeal any of the statutes of jeofails, or make the omission to amend error, or prevent a verdict from curing whatever was cured by a verdict before the passing of the act. It has, however, perhaps, introduced a practice, totally inconsistent with the spirit and intention which actuated the legislature of the state who enacted it. The defendant carefully avoids objecting to any defect in the declaration in the Court of Common Pleas; for he knows the plaintiff would be permitted to, and would amend. After taking his chance with the jury, he does not move in arrest of judgment, but he takes his writ of error, and asks this court to reverse, in direct opposition to the whole spirit of the law; and, in my opinion, to what ought to be and is the object of courts of justice,—which is, to hear the matter in dispute, and do justice between the parties. This law has been spoken of as tending to destroy all form in legal proceedings. If it has this effect, it is not the fault of the law; for whenever the defendant objects to the *narr.*, or the plaintiff to the plea, the one or the other must be amended; and, if the amendment is a surprise on the other party, and occasions the cause to be continued a term, the amendment is on paying costs of that term at least. It is then always in the power of the party to compel his opponent to make his *narr.* or his plea formal. If he will not do so at the proper time, if he will take his chance on the merits, he must not complain that this court will overlook many a matter which might have availed the party in one stage of the cause. We do not say that the declaration was good, but as it does state a cause of action, it is made good by the defendant's omission to object to it, and by the verdict of the jury.

The second error assigned was not relied on.

(Morrison v. Moreland.)

The third, fourth, and sixth errors were argued as one.

After the plaintiff had proved his case, the defendant proved certain payments made to the plaintiff, or for him and by his direction before this suit instituted: and then offered to prove, that the defendant was bail in a note with the defendant, and had been sued and judgment obtained, and examination issued; and that, on this the defendant had paid money for the defendant *since this suit was brought*. The Court of Common Pleas, believing that a payment since this suit was instituted was not a set-off, refused to admit the evidence of such payment. The defendant then attempted to prove, that although the payment was actually made after suit brought, yet the defendant had assumed the debt, and promised to pay it, and was accepted as payer before suit. He also undertook to prove that his goods were levied on for that debt before this suit was brought, and insisted that such levy was in law a payment and satisfaction of the debt, and entitled him to set it off.

Generally a debt must be due and demandable at the time suit is brought, or such debt cannot be set off. The party who offers to set it off, must show that he had a right of action against the plaintiff for the sum he offers to set off; and I do not recollect any case in which a debt not due at the time of suit brought, can be set off, unless perhaps the case of a special agreement of the plaintiff that it shall be allowed as a set-off; as, where a plaintiff, having brought suit, tells the defendant to take up a note in the hands of, or to pay a debt to, a third person, and that it shall be allowed as a set-off in the suit brought. In which case our courts would, under their equitable jurisdiction, admit it. There was not, however, any proof of such an agreement, either previous or subsequent to the payment of this money by *Morrison*.

As to the effect of the levy on his goods under the circumstances, and the act of assembly in this state, it will not avail *Morrison*.

By our law, a levy by a constable continues a lien only twenty days after the return of execution. Besides, in this case, the levy was never completed. The constable did, it is true, levy on and advertise the goods of *Morrison*; but, before the day of sale, the plaintiff in the suit in writing directed him to release them, and agreed to wait five months longer for his debt, and *this was done at the urgent and reiterated request of Morrison* and his friends. The property then was restored to *Morrison* free from the levy; he could dispose of it the next day. The return of the constable showed that it was not considered as levied on; and the man who thus by solicitation procures indulgence, comes with a bad grace to insist that he has paid a debt. There was then no error in the court below, in these bills.

The fifth and seventh errors related to an account made out all at one time on a loose sheet of paper, on which were set down charges of money paid, and goods delivered, &c. to *Moreland* by

(Morrison v. Moreland.)

Morrison. The court refused to let this go to the jury. It was then insisted, that as some of the items were proved by witnesses, that this paper should go to the jury, as containing a statement, and for the purpose of a memorandum of the dates and amount of the items proved. If it had contained no items, except those of which the defendant had given proof, this might have been so; but as the items of which there was no proof were also on the paper, and as giving these to the jury could answer no good purpose, the court were right in rejecting this paper. But the court were requested to file in writing their reasons for rejecting this paper. Our act of assembly, requiring the court to file opinions may seem to include such a case; but neither its spirit nor the construction heretofore put on it would seem to bring this case within it. After the testimony is concluded, and the cause is argued, and it is seen that the cause depends on the application of certain principles of law, it may be and is important that those principles should be stated correctly, and that the parties may know precisely how they were stated, and how applied to the cause trying. But on a question of the admissibility of evidence, the material matter is, was it rightly admitted, or rightly rejected, and the reasons have not in practice been included in the bill of exceptions, nor do I see that it would conduce to any good end to insert them: it would delay trials, swell records, and increase trouble and labour, for no useful purpose.

The defendant, *Morrison*, called his son and daughter to prove certain charges against *Moreland*; such as keeping cattle, horses, and sheep. These witnesses, on their cross-examination, said their father did not work the horses, or get the wool from the sheep, did not get harrow teeth, &c. from *Moreland*. The plaintiff, in conclusion, called on the witnesses to prove that he did get the wool, did get the harrow teeth. This testimony was objected to, and formed the subject of other bills of exceptions. It was rightly admitted; for when *Morrison* offered the price of keeping the horses and sheep as a set-off to the plaintiff's demand, it was competent for the plaintiff to prove, that he was paid for so doing at the time; and, further, it was competent as directly contradicting *Morrison's* witnesses, and going to destroy the whole effect of their testimony.

Upon the whole, the judgment of the court below is affirmed.

Judgment affirmed.

[CHAMBERSBURG, OCTOBER 31, 1826.]

In the Case of the Administration Accounts of HEAGER'S
Executors.

APPEAL.

Where executors purchase the notes of a bank at a discount, and with them pay a debt due by the testator to the bank, the estate shall have the benefit of such discount, and not the executors.

Where the accounts of executors filed on citation by guardian of infants were referred, and the Orphans' Court confirmed the report of referees, held that the decree of confirmation was subject to appeal, and might be reversed for error in law contained in the report appearing on the answers and admissions of the executors before the referees.

The opinion of the court was delivered by

DUNCAN, J. Appeal from the final settlement of the administration account of *James Breaden* and *Robert Irvine*, executors of the last will and testament of *Thomas Heager*, deceased, by *Patrick Devine*, guardian of *Elizabeth Heager*, minor daughter of *Thomas Heager*, and of *John* and *Joseph Emmet* and *Thomas Carney*, minor children of *Bridget Carney*, legatees under the will of *Thomas Heager*, from the decree of the Orphans' Court of *Cumberland* county.

The items to which exceptions are made, are Nos. 3 and 4 in the administration account, payments made to The Agricultural Bank. These payments are alleged to have been made with the paper of that bank, bought by the accountants at a discount of twenty-five *per cent.*, and which the appellants contend should be only credited for at the sum the accountants gave for that paper.

Taking the answers of the executors, on their examination before the referees, it is clear that a sum of at least one thousand dollars of the notes of that bank was bought up, at a discount of twenty-five *per cent.*, with a view to pay this bank debt of the testator.

The primary object in the purchase of the money from *Ristor*, says *William Breaden*, was, "that we probably expected it would go to pay the debt due to the bank;" and *William Irvine* says, he does not know but he did consider this judgment as one of the judgments to which the money ought to be applied. *Barney Carney*, a witness on behalf of the appellants, first informed *Breaden* where this money could be procured, and urged him to get it to pay off this debt. He is not contradicted by either of the appellees. *William Irvine* was in *Breaden's* store, as he says, when *Breaden* and *Ristor* were talking about the money; and admits that he bought of *Ristor*, something better than five hundred dollars, at twenty-five *per cent.* discount, and *Breaden* about five hundred dollars at the same discount.

(In the Case of Heager's Executors.)

If this had been an answer to a bill in chancery, calling on the executors to discover what they had actually advanced from their own money, to discharge this debt, I cannot hesitate or doubt, but that the Chancellor would decree that they should have only credit for that sum. The citation to settle was in the nature of such bill, and their statements to the referees referred to and made a part of the case—an answer. The Orphans' Court proceeds on chancery principles, and always examines the accountants on oath. At least the sum of one thousand dollars bought in, *for the purpose of paying this debt*, at a discount of one fourth, is admitted. The answer admits that, and proceeding on that admission, which is sure ground, we are to consider what in equity should be credited to the executors, whether the benefit arising from the situation in which they were placed, by their appointment as executors and trustees, should enure to their own benefit, or the legatees should have the advantage, by the accident of the depreciation of this bank's paper. In chancery, the principle is one never departed from, and is as binding as any axiom of the common law; *that he who takes upon him a trust, takes it for the benefit of him for whom he is intrusted, but not to take any advantage for himself*. A trustee shall never be permitted to raise in himself an interest opposite to that of his *cestui que trust*; and it is on this ground that it has been always held, that a trustee or particular agent shall not be allowed to become the purchaser of that which he holds in trust. *Whelpdale v. Cookson*, 2 Ves. 9. *Morret v. Paske*, 2 Atk. 54. So, if a trustee or executor obtain the renewal of a term in trust, such renewal shall be for the benefit of the trust. *Holt v. Holt*, 1 Chan. Cas. 191. Nor will the circumstance of the lessor having refused to renew to the *cestui que trust*, he being an infant, differ the case. *Chan. Cas.* 61. There cannot well be a stronger proof of the inflexibility of the rule than this: he may decline to accept the lease; but, if he does, though the lessor would not grant the benefit to the infant, if his trustee chooses to take it, it enures to the benefit of the infant. But, to come to the very case, if a trustee or executor compounds debts or mortgages, or *buys them in for less than is due on them*, he shall not take the benefit himself, but other creditors and legatees shall have the benefit of it also. 1 Salk. 155. *Darcy v. Hall*, 1 Vern. 49. *Plowman v. Plowman*, 2 Vern. 289. And for want of them the benefit shall go to the party who is entitled to the surplus. 1 Fonbl. 187. But if one acting for himself, and, not in the circumstance of an executor or trustee, buys in a mortgage for less than it is worth, he shall be allowed all that is due on the mortgage; for he stands in the place of him that assigned the mortgage, who might have given it to him gratis. And since he runs the hazard, if a loss happens, he ought to have the benefit, if it turns to his advantage. *Ibid.* The accountants could only act in the character of executors and trustees: there

(In the Case of Heager's Executors.)

could be no loss, the funds were amply sufficient, though not immediately available. The question never could be made, if the payment was with the funds of the testator in hand applied to the payment. It is only where the compensation is with the executor's own money. It is said the representatives of *Heager* are no losers, when they pay the whole money due; but it does not follow, that the executors are to be gainers. In this consists the whole fallacy of the argument; for any gain that is to be made is for the benefit of *cestui que trust*: and hence it is, that if a trustee sells to himself trust property, though for a fair and full price at the time, and the property rises in value, and he sells it for more, he is accountable for such surplus to the *cestui que trust*. The executors, only in the character of executors, could pay this debt. They reaped from their situation this opportunity for gain: that gain, then, accrues to them in their representative character. They bought in this paper, and instantly it was converted into gold, without any possibility of a loss. If, during the war of the revolution, when one hard dollar was worth sixty, or even one hundred continental dollars, when they were a legal tender in payment of specie debts, all the world would exclaim at the injustice of an executor, who should with five dollars buy five hundred dollars, or with fifty buy five thousand, pay off a specie debt, lie by, and not settle his accounts until hard money times, and then charge the estate with it as a specie payment: yet the principle is exactly the same, though the injustice is in a less degree. The gain, great or small, made while they act not for themselves, but in the circumstance of executors, is for the benefit of the trust estate.

There is another sum of one hundred dollars, bought at a discount of ten *per cent.*, that is to be subject to the deduction of ten *per cent.* I cannot find any thing in the evidence beyond these sums, and we cannot go by conjecture, however probable it may be, that on the whole sum paid the Agricultural Bank, the accountants have gained twenty-five *per cent.* But the evidence does not reach to this. On the executors' own statement, they were chargeable so far. There was nothing of fact to leave either to auditors or referees. It was a matter for the decision of the Orphans' Court, and therefore it is my opinion the report was open to the inquiry of that court. Even giving it the weight of a reference, the account must be reported to the Orphans' Court for their confirmation; the executors could not otherwise be discharged from their citation. It was returned, and received their sanction. How it would have been, had the guardian and executors entered into an agreement that it should be conclusive, and without appeal, whether it would or would not have bound the infants, is a question that it is not necessary now to decide. It appears to me, that it would be an extraordinary assumption of power by a guardian, and might be perverted to mischievous purposes. The right of appeal is not relin-

(In the Case of Heager's Executors.)

quished, if he could have so done. On a question so simple and plain, if the referees have clearly mistaken the law, the mistake would be excess of power, and that court should have set aside the report; and that they did mistake the law appears to this court quite clear; and, coming up by appeal, this court takes up all *de novo*. The Orphans' Court did not consider the report conclusive: they examined and confirmed it. Had this been a report to the Court of Common Pleas, and judgment had been rendered on it by that court, this court, on a writ of error, could only have sustained legal objections appearing on the face of the report; but it comes up to be decided on *de novo*. New evidence may be admitted, and it is in a great degree a new case. If a fact is disputed in the Orphans' Court, and an issue is prayed and directed, and a verdict and judgment rendered, so far as respects that fact, the verdict and judgment would be conclusive. Paying every respect to the opinion of these respectable referees, and giving it more weight than an account stated by auditors, who are but the mere clerks of the court, I think they have committed an error in allowing full credit for the items No. 3 and 4; and that the decree of the Orphans' Court is erroneous, and should be rectified by deducting twenty-five *per cent.* on one thousand dollars, the money bought from *Ristor*, to be applied to this debt, and ten *per cent.* from the one hundred dollars, bought from *Doyle* at that discount. This being the gain made by the accountants in the character of executors; and that this alteration being made in the decree, it should stand confirmed; but it is reversed, so far as respects these sums.

Decree reversed.

[CHAMBERSBURG, NOVEMBER 2, 1826.]

WALKER *against* PENNELL and another.

IN ERROR.

Scire facias on a judgment to recover a debt, which the plaintiff stated he had recovered, of four hundred and forty-three dollars and seventeen cents: on *nul tiel* record pleaded, the judgment produced was for nine hundred and eighty-seven dollars: *held*, that the defendant was entitled to judgment.

WRIT of error to the Court of Common Pleas of *Franklin* county, in which the plaintiff in error, *James Walker*, was plaintiff below, in an *alias scire facias* issued against *George Pennell* and *Henry Guiger*, the defendants in error and defendants below, to revive a judgment rendered on a former *scire facias*.

Findlay, for the plaintiff in error.

G. Chambers, contra.

(Walker v. Pennell and another.)

PER CURIAM. Issue was joined in this case, in the Court of Common Pleas, on the issue of *nul tiel* record, and the court decided in favour of the defendant. On inspection of the record, it appears that a *scire facias* was issued by the plaintiff for the recovery of a debt of four hundred and forty-three dollars and seventeen cents, for which he had obtained judgment against the defendant. But the record produced in support of the *scire facias*, shows a judgment for the sum of nine hundred and eighty-seven dollars. We are therefore of opinion that the judgment should be affirmed, the plaintiff having failed in his proof of the record recited in the *scire facias*.

Judgment affirmed.

[CHAMBERSBURG, NOVEMBER 2, 1826.]

COMMONWEALTH against SHRYOCK and another.

IN ERROR.

If the person entitled to a distributive share of the estate of an intestate takes the bond of the administrator for the payment of the amount of the share, the surety in the administration bond is discharged to such amount.

ERROR to the Court of Common Pleas of *Franklin* county, in a suit brought by the Commonwealth of *Pennsylvania*, plaintiff in error and plaintiff below, against *John Shryock* and *James Jack*, surviving obligors in a bond with *James Brotherton*, deceased, in which the verdict and judgment were rendered in favour of the defendant.

This case was decided in the court below, on a statement of facts in the nature of a special verdict: *John Shryock*, one of the defendants, and *James Brotherton*, deceased, were administrators of *William Glass*, deceased, and gave their bond to the Commonwealth, with *James Jack*, the other defendant, their security, for their faithful administration, &c. On the 17th of *September*, 1805, *Shryock* and *Brotherton* settled their administration account, on which there was a balance of thirteen hundred and thirty-eight pounds, nine shillings, and three pence, due from them, to be distributed among the personal representatives of *William Glass*. Of this balance *Hetty M Williams*, then a minor, for whose use this action on the administration bond was brought, was entitled to a portion, viz. one hundred and forty-six pounds. She arrived at full age, on the 22d of *July*, 1817, and on the 27th of *November* following, came to a settlement with *Shryock*, (*Brotherton* being then dead,) on which the sum of six hundred and forty dollars, was agreed to be due from *Shryock*, for which he gave his bond of the same date to the said *Hetty M Williams*, payable with inter-

(Commonwealth v. Shryock and another.)

est in twelve months from the date. Partial payments were made by *Shryock*, at different times, amounting in the whole to three hundred and eighty dollars and eighty-three cents; and the question submitted to the Court of Common Pleas, was, whether on these facts, *James Jack*, the security in the administration bond, was discharged. The opinion of the court was, that he was discharged.

Dunlop, for the plaintiff in error, contended that the plaintiff could recover on the administration bond, notwithstanding his having taken *Shryock's* bond. 8 *Serg. & Rawle*, 110. 2 *Johns. Ch.* 554. 13 *Johns.* 174. 15 *Johns.* 433. 7 *Johns. Ch. R.* 332. 2 *Caines' Cas.* 1. This bond differs from a bond for payment of money. It is conditioned for the administration of the estate of a deceased person. It is given to the Commonwealth for the benefit of all persons interested. It was not affected by the circumstance of a new bond given by *Shryock* to one of the persons interested. *Hetty M'Williams* had no power over the bond given to the Commonwealth, nor has she pretended to any power, nor undertaken to stop the suit on it. The taking of *Shryock's* bond was not a giving of time: it did not discharge the debt.

Crawford, contra, insisted, 1. That the taking of *Shryock's* bond was a giving up of the right to sue on the administration bond: 2. From the facts in this case the surety was discharged.

1. If an executor takes a bill on a banker in payment of a bond debt due his testator, the debt is discharged. 1 *Vern.* 473. *Toll. Ex.* 425. If the creditor takes a bond from the administrator of the debtor, the estate of the intestate is discharged. *Geyer v. Smith*, 1 *Dall.* 347. 1 *Serg. & Rawle*, 402. Legatee takes a a bond from the executor, the estate of the testator is discharged. *Toll. Ex.* 491. *Yelv.* 38. 1 *Bay*, 112. 4 *Bac. Ab.* 446. Acceptance of a bond is an extinguishment of a legacy *B. N. P.* 182. A distributive share in the hands of an administrator is a simple contract debt.

2. *Shryock's* security, *James Jack*, is discharged by taking a bond from *Shryock*, payable in twelve months. *Rathbone v. Warren*, 10 *Johns.* 587. *Cope v. Smith*, 8 *Serg. & Rawle*, 110. *Carl v. Commonwealth*, 9 *Serg. & Rawle*, 63.

The opinion of the court was delivered by

TILGHMAN, C. J. Questions of this kind have been several times before us, and although we have expressed our disinclination to extend the law in favour of sureties further than it has been already carried, yet we have always declared that we hold ourselves bound by principles that appeared to be well settled. One of these principles, I take to be, that when the creditor, without the the privity of the surety, enters into an engagement with the principal, for extending the time of payment, so as to tie up his hands from bringing suit for a limited period, the surety is thereby discharged.

(Commonwealth v. Shryock and another.)

Now, that is just the present case, for certainly *Hetty M'Williams* would have been enjoined by chancery from bringing suit on the administration bond before the time fixed for the payment of *Shryock's* bond to her. The acceptance of that bond amounted to an agreement not to proceed against the obligor, for the recovery of her share of *William Glass's* estate, before the expiration of twelve months from its date. But, it has been objected, that the administration bond having been given, not to *Hetty M'Williams*, but the Commonwealth, for the benefit of all persons interested in the estate of *William Glass*, it was not in her power to suspend a suit on that bond. It is very true, she could not have prevented others from suing; but she might make an agreement binding on herself. I find on the record in this case, an agreement, that this cause should be tried on its merits as if judgment had been obtained on the administration bond in the name of the Commonwealth, and then a *scire facias* had issued according to our act of assembly, for the recovery of the claim of *Hetty M'Williams*. So that she has separated her case from that of all others interested in the official bond of the administration. The whole transaction bears strong intrinsic evidence, of an intent to look to *Shryock*, and to him only. Otherwise the settling with him, and taking his bond, without consulting his security, is not to be well accounted for. At all events, the case comes within the range of numerous authorities. The law on this subject was carefully considered in *Cope v. Smith*, 8 *Serg. & Rawle*, 110.

I have no doubt that the judgment of the Court of Common Pleas in the case now before us, was right, and am therefore of opinion that it should be affirmed.

Judgment affirmed.

[CHAMBERSBURG, NOVEMBER 2, 1826.]

BARNET *against* BARNET.

IN ERROR.

On the plea of release of dower, in an action of dower, evidence is not admissible on the part of the defendant, of a recovery by the plaintiff against the husband's executors in covenant, on an agreement between the husband and wife previous to the marriage, by which he agreed in case they lived together ten years, to pay the wife four hundred dollars.

The wife's dower is not barred by a deed executed and acknowledged by her with her husband, if it does not appear in the certificate of the acknowledgment that the contents of the deed were made known to the wife by the justice, nor that she did in fact know them.

The act of assembly curing defects in the acknowledgments of femes covert is constitutional: but it does not apply where judgment was rendered previous to its passage.

Parol evidence is not admissible to supply defects in the justice's certificate; but it is, to prove forgery or fraud.

In dower, when the husband did not die seised, evidence of the annual value is not admissible.

ERROR to the Court of Common Pleas of *Perry* county.

Alexander, for the plaintiff in error.

Carothers, contra.

The opinion of the court was delivered by

TILGHMAN, C. J. This was an action of dower, brought by *Margaret Barnet*, widow of *Thomas Barnet*, against *Frederick Barnet*, the plaintiff in error. The defendant pleaded a release of dower by the plaintiff, who replied that she had not given a release, and on this issue was joined.

The first error assigned, is in the rejection of a record offered in evidence by the defendant, in an action of covenant, brought by the demandant against the executors of her late husband, on certain articles of agreement executed previous to their marriage, by which the husband covenanted, that in case he and his intended wife should live together ten years, he would pay her four hundred dollars. In this action, damages were recovered for breach of *Thomas Barnet's* covenant, in not paying the four hundred dollars. This evidence was rightly rejected for several reasons. It had no relation to the issue joined, viz. release of dower, or no release by the demandant. It did not purport to be a release, nor had it any resemblance to one. Nor did it contain any agreement on the part of the demandant to accept the four hundred dollars in satisfaction of dower. If the husband had died within the ten years, and his wife had survived him, she would have taken no money by this agreement, and thus, according to the construction contended for by the defendant, she would have lost both dower and money. There was no error, therefore, in rejecting this evidence.

(Barnet v. Barnet.)

The second error, is the opinion given by the court, that the acknowledgment of a deed from *Thomas Barnet*, deceased, and his wife, (the demandant,) for the conveyance of the land in which dower is now claimed, was defective so far as concerned the wife, and not sufficient to bar her of her dower. It does not appear by the certificate of this acknowledgment, that the contents of the deed were made known to the wife, by the justice who took her acknowledgment, or that she did in fact know them. It has been expressly decided by this court, that this is an incurable defect; and therefore the opinion of the court below was right. Since the judgment in this case in the Court of Common Pleas, an act of assembly has been passed for curing defects in the acknowledgment of deeds by married women. Had this act been passed before the judgment below, it would have cured the defect above-mentioned in the demandant's acknowledgment, and there would have been error in the court's opinion. It is our unanimous opinion, that there is nothing unconstitutional in this act of assembly, but it is also our unanimous opinion that it does not extend, by retrospect, to render a judgment erroneous, which was entered before its passage. The question now to be decided, is, whether there was error in the judgment below at the time it was rendered, and we are of opinion there was not.

The third error assigned, is in the rejection of parol evidence offered by the defendant to prove that when the demandant made her acknowledgment, she knew the contents of the deed, and received eight dollars from *Frederick Barnet*, for executing the deed. That such evidence was inadmissible, was decided by this court in the case of *Watson against Bailey*. There may be cases of gross fraud, in which parol evidence would be received, unless the land had passed into the hands of a purchaser for valuable consideration, without notice of the fraud. I have known two cases of forged deeds, where the justice who took the acknowledgment was imposed on by a person who assumed the name of the supposed grantor. There parol evidence was received. And so I think it would be admissible to prove collusion between the husband and the justice, in consequence of which it was falsely certified that the wife had appeared and made an acknowledgment such as is required by law. But there was nothing like fraud in the evidence offered by the defendant. Its object was to prove, that the certificate of the justice did not contain the whole truth, and comes exactly within the principle of *Watson against Bailey*.

The fourth and last error is, in the rejection of evidence offered by the defendant to prove the annual value of the land.

This evidence was improper. The demandant claimed no damages, because her husband did not die seised. For what purpose then, was the annual value to be inquired into? When the demandant takes out her writ of seisin, she will be entitled to one third, according to the value of the land at the time it was aliened

(Barnet v. Barnet.)

by her husband. The inquest must see to that, and the court has sufficient control over their proceedings to protect the defendant from wrong.

It is the opinion of the court, that the judgment should be affirmed. And the record is to be remitted to the Court of Common Pleas, in order that such further proceedings may be had, as are agreeable to law.

Judgment affirmed.

[CHAMBERSBURG, NOVEMBER 2, 1826.]

GRIMES *against* The COMMONWEALTH.

Same *against* Same.

IN ERROR.

The punishment of larceny cannot exceed three years' imprisonment at hard labour.

THE defendant below and plaintiff in error, *Alexander P. Grimes*, was convicted on an indictment for larceny, in the Court of Quarter Sessions for *Cumberland* county, and was sentenced to an imprisonment at hard labour for seven years.

Error was now assigned in the sentence of the court.

After argument,—

The opinion of the court was delivered by

DUNCAN, J. By the act of the 5th of *April*, 1790, to reform the penal laws of this state, it is enacted that every person convicted of simple larceny, to the value of twenty shillings and upwards, or as accessory before the act, shall restore the goods and chattels so stolen, or the full value thereof, and shall forfeit and pay to the Commonwealth the like value, and undergo a servitude for any term not exceeding three years, at the discretion of the court before whom the conviction shall be, and shall be confined and kept at hard labour, fed and clothed, &c. *Purd. Dig.* 741. And by the act of the 21st of *March*, 1806, the court before whom the conviction shall be had, is invested with a discretionary power of directing the imprisonment, labour, and confinement to be had in the jail of any county within this Commonwealth, or in the jail and penitentiary of the city of *Philadelphia*. *Purd. Dig.* 647. And by the 4th section of the act of the 5th of *April*, 1790, any person convicted of burglary, or of being an accessory after the fact in any felony, or of receiving stolen goods, knowing them to have been stolen, or of any other offence, not capital, for which by the laws in force before the act, entitled an act to amend the laws of this state, burning in the hand, cutting off the ears, placing

(Grimes v. The Commonwealth.—Same v. Same.)

in the pillory, whipping, or imprisonment for life, is or may be inflicted, shall, instead of such parts of the punishment, be fined and sentenced to undergo in like manner, and be confined and kept at hard labour, fed and clothed, &c., for any term not exceeding two years, in the discretion of the court. And by the act of the 4th of *April*, 1807, *Purd. Dig.* 645, it is enacted that instead of this two years' imprisonment, inflicted by the prior act, the courts shall be invested with the power of extending the confinement, in such cases, to a period not exceeding seven years, in their discretion, according to the circumstances of the case before them. Provided, that this power thus conferred shall not extend to offences created in the said section, of burglary, or being accessory after the fact in any felony, or receiving stolen goods knowing them to have been stolen. *Purd. Dig.* 647.

This provision does not extend to any enumerated offences, on which a punishment was to be inflicted, but only to the non-enumerated cases, for the perpetration of which burning in the hand, whipping, pillory, &c. by the laws in force before the act entitled an act to amend the penal laws of this state, was the punishment; and is confined to that class of non-enumerated offences, punishable with two years' imprisonment. Now, simple larceny was an enumerated offence, punishable by a three years' imprisonment, which still is subject to that punishment. The punishment of larceny cannot exceed three years' imprisonment, and confinement at hard labour.

The sentence inflicting imprisonment and confinement for seven years for the offence of which the prisoner was convicted, is therefore erroneous, and must be reversed.

Judgment reversed.

[CHAMBERSBURG, NOVEMBER 2, 1826.]

DELANEY *against* BRINDLE.

IN ERROR.

When a justice of the peace has rendered judgment for the plaintiff, under the 14th section of the one hundred dollar act, for a sum exceeding one hundred dollars, the justice has jurisdiction of an action by the plaintiff against the constable for a false return to an execution issued in such suit, though the amount exceeds a hundred dollars.

ERROR to the Court of Common Pleas of *Franklin* county.

The case was argued by—

Dunlop, for the plaintiff in error, and
J. Chambers and *G. Chambers*, contra.

The opinion of the court was delivered by

ROGERS, *J.* *Jacob Brindle* obtained a judgment, before a justice

(Delaney v. Brindle.)

of the peace, for a sum exceeding one hundred dollars, under the 14th section of the act of the 20th of *March*, 1810, entitled an act to amend and consolidate, with its supplements, the act entitled an act for the recovery of debts and demands not exceeding one hundred dollars, before a justice of the peace, and for the election of constables, and for other purposes.

The justice of the peace issued an execution on this judgment, and directed it to *James Delaney*, a constable, who made a false return to the execution. The plaintiff brought suit against the constable for the false return: from the judgment of the justice, there was an appeal to the Court of Common Pleas; to reverse whose judgment this writ of error is taken. The only question is, whether the justice of the peace had jurisdiction; the amount in controversy being above one hundred dollars.

This act of assembly, the legislature intended as a complete system, and whatever opinion may be entertained of the policy of the 14th section of the act, still it is the duty of the court to carry the system into effect. The 14th section provides, that the justices of the peace shall take cognizance of controversies for any sum exceeding one hundred dollars, if the parties voluntarily appear before him for that purpose, by entering judgment; and that such judgments shall be prosecuted *to recovery as other judgments by this act are made recoverable*.

With respect to the recovery then of the money, judgments under and above one hundred dollars are placed on the same footing. How, then, are judgments under one hundred dollars collected? In default of payment, by the 11th section an execution is directed to the constable of the ward district or township where the defendant resides, &c. commanding him to levy the debt, &c. The 12th section provides that on the delivery of an execution to any constable, an account shall be stated in the docket of the justice, and also on the back of the execution of the debt interest and costs &c. In case of a false return, the justice is directed to issue a summons against the constable, commanding him to appear and show cause why an execution should not issue against him for the amount of the first above-mentioned execution. This section of the act, in the opinion of the court, embraces all cases made cognizable under the act, whether under or above one hundred dollars.

It is objected that this act gives no appeal. As between the plaintiff and the constable it is not an amicable action, (although between the original parties it is so,) but it is an adversary suit, and came directly within the provision of the 4th section, which gives the right of appeal within twenty days.

It will certainly not be pretended but that the constable, if not liable before the justice, is liable in the Court of Common Pleas, for false return. If suit, had been brought, then, what is to direct that court, but the different provisions of the act directing the manner in which the money shall be collected before a justice of

(Delaney v. Brindle.)

the peace. If the justice of the peace might, nay, was bound to issue an execution, and comply with the directions of the act, stating the cause in his docket, on the back of the execution, the amount of debt, interest, and costs; if the constable was bound to execute the process under the penalty therein provided, I do not see why we shall not also say, that the justice is bound to issue a summons to show cause why execution should not issue against him for a false return. Unless the justice of the peace has power to issue an execution, this money cannot be collected; for certainly the Court of Common Pleas has no power to issue an execution on a judgment before a justice. It would then appear to me absurd, that he had power to begin, but would not conclude the process necessary for the collection of the money.

It surely will not be contended, that when the debt is under one hundred dollars when judgment is rendered, and the execution exceeds that sum, either from the costs or claiming interest, that the justice has no power in case of a false return by a constable, to issue a summons and give judgment against him. The reasoning, in this case, would be equally strong as in the other. There is, in my opinion, a great convenience in saying that he who has commenced the process, may make an end of it by the collection of the money from the constable, in case of a false return.

Judgment affirmed.

[CHAMBERSBURG, NOVEMBER 2, 1826.]

WISHART *against* DOWNEY and Wife.

IN ERROR.

To a *scire facias* by husband and wife, on a recognizance to recover the wife's distributive share, the defendant may set off money lent to the husband, before the recognizance was given.

Query, whether a set-off can be given in evidence, under the plea of payment with leave, unless there be a rule of court.

It seems payments of money may be proved by a witness without producing receipts: but if receipts were given and are not produced on notice, nor accounted for, the party's case will be affected by it.

Scire facias in the Court of Common Pleas of *Franklin* county, on a recognizance in the Orphans' Court of that county, brought by *James Downey* and *Catherine* his wife, the defendants in error and plaintiffs below, against *John Wishart*. The recognizance was entered into by *Wishart* to *Downey* and wife, to secure to her her share of her father's estate. The defendant pleaded payment with leave, to which the plaintiff replied *non solvit*, and issue was joined.

(Wishart v. Downey and Wife.)

On the trial, the defendant offered to give in evidence parol proof that the defendant, *John Wishart*, lent to *James Downey*, the plaintiff, two hundred dollars, in the year 1811, immediately before the appraisement of the land, and entering into the recognizance aforesaid, and further that a note or bond was given for the same, which could not now be found;—which evidence the court, on objection by the plaintiff's counsel, overruled:—to which opinion of the court, the defendant excepted, and the court sealed a bill of exceptions.

The defendant then gave in evidence the receipts of the plaintiff on the 8th *April*, 1815, for one hundred and sixty dollars, and on the 3d *December*, 1817, for fifty dollars.

By consent, *John Wishart*, the defendant, being sworn, stated that the piece of paper, part of a receipt signed by *James Downey*, was for sixty-five dollars.

The defendant offered to prove by parol evidence, by *Juliana Wishart*, that several sums of money were paid, for which receipts were given, as the witness stated;—to which evidence the plaintiffs objected, and the court sustained the objection: to which opinion of the court, the defendant excepted, and the court sealed another bill of exceptions.

The opinion of the court, (GIBSON, J. being absent,) was delivered by

HUSTON, J. *James Downey* and wife brought a *scire facias*, on a recognizance entered into by *John Wishart* for *Catherine Downey's* share of her father's estate,—the recognizance was to *James Downey* and *Catherine*. After oyer, the defendant pleaded payment with leave to give the special matter in evidence,—replication and issue. After the plaintiffs had given evidence to make out their case, the defendant offered to give parol proof, that the defendant, *John Wishart*, lent *James Downey*, the plaintiff, two hundred dollars in the year 1811, immediately before the appraisement of the land, and entering into the recognizance aforesaid; and, further, that a note or bond was given for the same which cannot now be found. This evidence was objected to and overruled, and exception to the opinion of the court was taken.

This exception and the following one in the cause are very loosely stated, and are the only cases from that county which are so. It is not certain why the evidence was rejected. Regularly, the defendant ought to have proved the existence and subsequent loss of his bond or note, and then the contents of it, or else the actual loan of the money. In *England*, the suit being in right of the wife, and of such nature as that it would survive to her, this claim could not be set off. Our law differs from theirs, and this if proved was a set-off. See *Murray v. Williams*, 5 Binn. 135, and *Yohe v. Barnett*, 1 Binn. 358,—expressly in point.

Whether a set-off can be given in evidence under the general plea of payment with leave, &c. has been questioned, and different

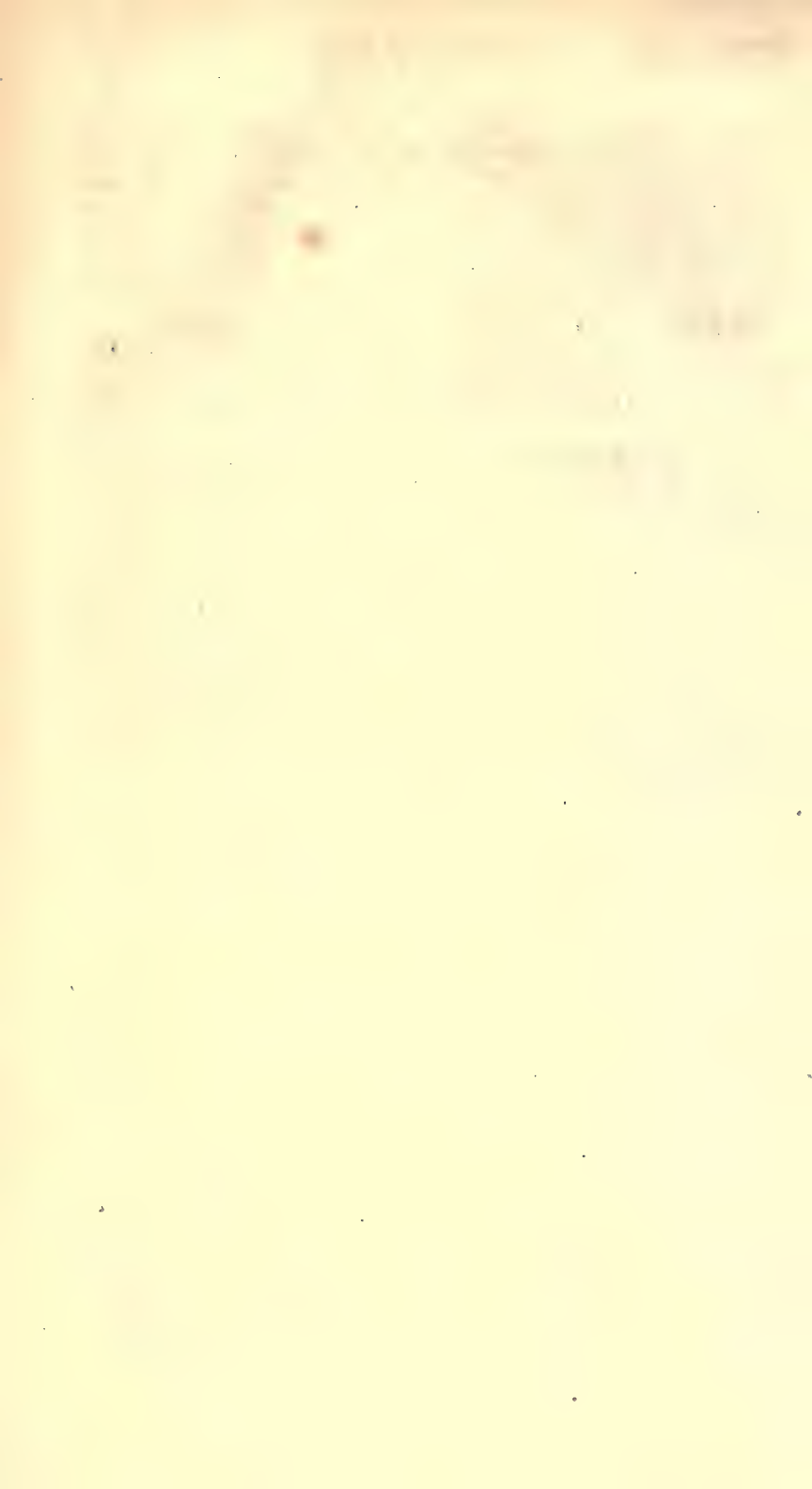
(Wishart v. Downey and Wife.)

opinions seems to have been entertained. This, independent of any rule of court;—but the 50th rule of this court is express, and a specification of it need not be given unless required: while that rule is in force it would seem it can be given in evidence and need not be pleaded. Whether the evidence offered would prove it a note under seal, or without a seal, or a bond, is not stated; and whether the statute of limitations could have any effect on this part of the defence, cannot be known until the evidence is heard.

The defendant then gave in evidence several receipts for money paid the plaintiff, in part; and offered to prove the payment of other sums, by a person who saw them paid, and for which receipts were given and not produced: this evidence was overruled, and exception taken.

Why a defendant should not produce his receipts, if he has them, I cannot see. As to precision of date and amount paid, they are, it seems to me, much preferable to the memory of any witness, but it has been decided by this court, (see *Heckart v. Haine*, 6 Binn. 16,) that the production of the receipt or of the subscribing witness to it, where there is one, is not necessary. The receipt in writing is not necessary. The fact that money was paid may be proved by any witness who knows it. I should suppose this case was not brought into the view of the judge. At the same time, I would say, if notice to produce the receipts is given, and they are not produced, and no reason given why they are not, it would be matter which ought to affect the defendant's case, more or less according to circumstances.

Judgment reversed, and *a venire facias de novo* awarded.



CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—DECEMBER TERM, 1826.

[PHILADELPHIA, DECEMBER 15, 1826.]

RODRIGUE *against* CURCIER.

AMENDMENT.

Where the wrong for which the plaintiff seeks redress, is the misconduct of the defendant as his agent in the sales of certain cottons consigned to him, the plaintiff may amend his declaration under the act of assembly by adding counts, preserving the substance of the same complaint.

CASE by *Andrew Rodrigue*, the plaintiff, against *John Curcier*, the defendant, in which the plaintiff went to trial before DUNCAN, J., in *November* last at *Nisi Prius*, on a declaration filed in *February*, 1822, containing the following counts:—

First Count. The plaintiff shipped one hundred and seven bales of cotton, consigned to the defendant in *France*, with express orders to sell the same immediately after the same should come to his hands, which the defendant accepted.

Second Count.—like the first as to shipment, &c. of the cottons, which the defendant undertook and promised he would sell without delay, upon their arrival, for the best price that could then be got; but did not.

Third Count. Same as the second, but for the plaintiff's two-thirds of the cotton.

On the 6th of *December*, 1824, the pleas were filed, *non assumpsit* and payment, with leave, &c. Replication, *non solvit* and issue. During the trial, the plaintiff moved for leave to amend

(Rodrigue v. Curcier.)

his declaration by filing the following counts, and leave was granted.

First Count. The plaintiff consigned one hundred and seven bales of cotton to the defendant in *France*, with express orders to sell the same, after the same should have come to his hands, for the best price or prices that could be gotten, and without waiting for an imaginary rise, which the defendant did not.

Second Count. The plaintiff consigned the cotton to the defendant, to be sold by him for a reasonable commission; in consideration whereof, the defendant promised to use and employ due diligence, skill, and fidelity in the sale of the cottons, and to avail himself of the market in *France* to obtain the best prices that could be reasonably obtained after the arrival of the cottons, but, wholly neglecting his promise, did not use and employ due diligence, skill, and fidelity in the sale, and did not avail himself of the market in *France* to obtain the best price, &c.

Third Count,—like the last preceding, but for two thirds of the cotton.

There was a fourth count to the original declaration, for money had and received.

There was also a fourth count to the amendment, for goods sold and delivered, which, however, Judge DUNCAN rejected.

The jury were then discharged, at the defendant's instance, on the ground of surprise; and the question now submitted to the court in bank, on the defendant's motion to strike out the new counts, was, whether the plaintiff might so change his ground of proceeding.

J. R. Ingersoll, and *C. J. Ingersoll*, for the defendant, insisted that the amendment was not within the act of assembly of the 21st of *March*, 1806, section 11, inasmuch as it went to introduce a new cause of action, which it had been frequently decided the plaintiff was not at liberty to do. They referred to *Benner v. Fry*, 1 Binn. 366. 5 Binn. 33. 1 Serg. & Rawle, 32. *Shock v. M'Chesney*, 4 Yeates, 510. *Grasser v. Eckart*, 1 Binn. 575. *Keasby v. Donaldson*, 1 Bro. Rep. 103. *Howard v. M'Cowen*, 1 Bro. Rep. 148. *Ebersol v. Krug*, 1 Binn. 53. *Thackara v. Curren*, 2 Bro. Rep. 246. *Miles v. O'Hara*, 1 Serg. & Rawle, 32. *Smith v. Rutherford*, 2 Serg. & Rawle, 359. *Conyngham v. Day*, 2 Serg. & Rawle, 1. *Farmers and Mechanics' Bank v. Israel*, 6 Serg. & Rawle, 293. *Newlin v. Palmer*, 11 Serg. & Rawle, 98.

Duponceau and *Binney*, contra, were stopped by the court.

PER CURIAM. The counsel for the defendant have urged every argument in support of their motion of which the case admitted; but as the court has no doubt on this subject, it is unnecessary to hear the counsel for the plaintiff. The act of assembly, under which the amendment, during the trial at *Nisi Prius*, was permitted, has long ago received a construction from which it would be wrong to depart. The construction is this. When the merits

(Rodrigue v. Curcier.)

of the case cannot be reached without an amendment, it is to be granted, provided that the cause of action be not changed. In *Shock v. M'Chesney*, the court refused an amendment, by which an action of *slander* would be converted into an action for a *malicious prosecution*. So, in *The Farmers and Mechanics' Bank v. Israel*, where an action was brought on several promissory notes, an amendment was refused, by which *several other notes* would have been included in the action. In both these cases, the amendment asked for, would have enabled the defendant to recover on causes of action which he had not in contemplation when the suit was brought. But when the object of an amendment is, not to forsake the matter for which the action was truly and substantially brought, but to adhere to it, and effect a recovery on it, it is the duty of the court to grant the amendment. For example, the plaintiff declares in an *indebitatus assumpsit* for goods sold and delivered; but finding, on the trial, he is disappointed in the evidence, he asks permission to add a count on a *quantum meruit*. The amendment should be allowed, because the substance of the action was, the value of the goods sold and delivered. It may be said, that this is introducing a different contract from that set out in the declaration;—and true, in *form*, it is. But the injury done to the plaintiff is the non-payment for goods sold by him to the defendant; and the additional count is only for the purpose of recovering damages for that injury. So, in an action on a policy of insurance, when the plaintiff declared on losses by *capture by an enemy*, and by *perils of the sea*, the court permitted an amendment, by adding a count for a loss by *barratry*. This might be called a new cause of action; but it adhered to the *policy*, by which the defendants engaged to indemnify the plaintiff from loss by *barratry*, as well as by capture and perils of the sea. The object of the action was to recover for a loss averred by the policy, and this amendment not going out of the policy, it was admitted. In construing this act of assembly, we have endeavoured to carry its intention into fair effect. If, in practice, its inconveniences are found to balance its conveniences, it is for the legislature to apply the remedy by a repeal. But, it would be injustice not to say, that it has been productive of good, as well as evil. It is sometimes abused, by artful counsel, for purposes of delay. But it frequently enables the plaintiff to recover on an honest cause of action, instead of being thrown out of court, and driven to a new suit. We have therefore not restrained ourselves to carry a very strict construction, such as was made by the District Court, in the case cited from 2 *Browne*, 246, (*Thackara v. Curren*), of which I cannot approve. That was an action of slander, by words spoken of the plaintiff, affecting him in his *trade*, which was set forth as that of a mason and bricklayer. He asked leave to amend by calling his trade what it really was, that of a plasterer, and it was refused. That, surely, was in violation of the act of assembly

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because the slander was the same, whether the plaintiff was a mason and bricklayer, or a plasterer.

But, to apply the construction which the law has received from this court, to the case before us. The wrong complained of by the plaintiff, and for which he sought redress, was, the defendant's misconduct, as his agent, in the sale of certain cottons consigned to him. This misconduct was set forth in various forms by the original declaration, and the plaintiff asked leave to add several other forms, tending to the same point. The substance of the same complaint was preserved in all these forms; that is, that the plaintiff had been injured by the defendant's mismanagement of the business committed to him. We are of opinion, therefore, that the plaintiff was entitled to the amendment, and the judge who granted it, had no right to refuse it.

Defendant's motion rejected.

[PHILADELPHIA, DECEMBER, 1826.]

DOUGHERTY *against* SNYDER, Surviving Executor of SNYDER.

Contract in *Louisiana*, according to the laws there between husband and wife, enforced here against the husband's executors.

What code prevailed in *Louisiana*.

Laws of *Louisiana* proved by the testimony of counsel residing there, learned in the law, no written law on the subject being produced.

Voluntary payment by an executor to legatees, without taking a refunding bond, does not excuse him from the charge of *devastavit* at the suit of a creditor.

A wife cannot be a citizen of a state different from that in which her husband's domicile is, so as to sue in the courts of the *United States*.

A feme covert cannot in general sue her husband in *Pennsylvania*: and, therefore, she has six years after the discoveriture by his death, within which she may sue his executors, on a valid contract between them.

THIS case was tried before DUNCAN, J., at *Nisi Prius*, and a verdict rendered in favour of the plaintiff for nine thousand five hundred dollars, and the jury found assets in the defendant's hands, amounting to five thousand, one hundred, and twenty dollars. The defendant now obtained a rule to show cause why a new trial should not be granted, and filed the following reasons:—

1. Because the plaintiff was permitted to prove, by parol testimony, the law of *Louisiana* in 1791, then a *Spanish* province, in relation to contracts made between husband and wife, without first showing such law to be the unwritten law, and therefore within the rule for the admission of parol testimony.

2. Because the plaintiff was permitted to prove the written law of *Louisiana*, in the year 1791, then a *Spanish* province, in relation to contracts made between husband and wife, by parol testimony.

(Dougherty v. Snyder.)

3. Because the judge charged the jury, that no length of time whatever, unaccompanied by other circumstances, was sufficient in this case to raise a presumption of payment, or satisfaction of the debt, because the time would not begin to run during the coverture of the plaintiff, and the suit was brought within six years after discovery; and that, as it was a law of limitations, by positive enactment, the time of the statute, and nothing short of that, was a bar, and the suit was brought within six years after discovery.

4. Because it appears, by evidence discovered since the trial, that the money advanced by the plaintiff to the defendant's testator was fifteen hundred dollars, and not seven thousand; for which sum the jury have given a verdict with interest.

5. Because from the letters of the plaintiff to the executor before payment made by him to the legatees, he was not guilty of a *devastavit* in making such payment.

6. Because the jury here allowed six *per cent.* interest, when five *per cent.* is the rate of interest by the law of *Louisiana*.

7. Because the plaintiff, never having resided out of *Louisiana* since her marriage, and the husband never having resided in *Louisiana* since the year 1791, the plaintiff is barred by the statute of limitations, having the right to bring an action against her husband in his lifetime, notwithstanding the coverture.

8. Because the plaintiff cannot maintain this action against executors.

Purdon and Chauncey, for the defendant.

Duponceau, for the plaintiff.

The opinion of the court was delivered by

DUNCAN, J. This is a brief outline of the cause of action. The plaintiff, a widow lady resident in *New Orleans*, possessed of considerable real and personal estate, intermarried in 1791 with *George Dougherty*, the testator,—a man then in rather indigent circumstances. He cohabited with her a few months, and in *September*, 1791, obtained from her seven thousand dollars, for which he gave her the following instrument of writing:—

“Je soussigné, en présence de témoins, reconnois avoir reçu de ma femme la somme de sept mille piastres qu'elle me confie pour aller faire une pacotille à *Philadelphie*, et revenir de suite, ayant chargé la dite somme de sept mille piastres à bord du Balaou *Espagnol*, le *Saint Joseph*, Captain *Bordos*, sur lequel Balaou je suis passager. Je lui donne la présente reconnoissance comme étant sa propriété, afin qu'elle puisse réclamer la dite somme de sept mille piastres du capitaine ou de mes parents à *Philadelphie*, en cas que je viendrois à mourir, à Dieu ne plaise. 'A la *Nouvelle Orleans*, le 26 *Septembre*, 1791.

Jn. Dupuy.

F. Pacquetet.

George Dougherty.

(Dougherty v. Snyder.)

TRANSLATION.

"I, the underwritten, in the presence of witnesses, acknowledge to have received of my wife, the sum of seven thousand dollars, which she intrusts me to go and purchase an adventure at *Philadelphia*, and return immediately, having shipped the said sum of seven thousand dollars on board the *Spanish Schooner St. Joseph*, Captain *Bordos*, in which schooner I am a passenger. I give her the present acknowledgment, as being her property, in order that she may claim the said sum of seven thousand dollars of the captain, or my relations at *Philadelphia*, in case I should happen to die, which God forbid. *New Orleans*, 26th September, 1791.

George Dougherty.

Jn. Dupuy.

F. Paquetet."

He immediately after this, sailed for the *United States*, and came to *Philadelphiu*, where he resided until his death, in 1820. He made a will, by which he bequeathed to his wife one third part of the rents and profits of his real estate, and the residue of his estate he gave to his sisters. Some time after, but within a year after his death, the plaintiff brought this action to recover the seven thousand dollars. It did not appear that after he left *New Orleans*, he had any communication or correspondence with his wife; for, in his will, he states he does not know whether she is alive or dead. Taking into view the substance of the counts in the declaration, it was an *assumpsit* for money lent to the husband by the wife in the common form, and for money advanced to him to be paid on his death. The plaintiff claims the original sum, with interest from the commencement of the action. Besides the proof by the written document, the plaintiff proved the advance of this money by the deposition of two witnesses. The defendant pleaded *non-assumpsit*, and *non-assumpsit infra sex annos*, and payment. To the plea of the statute of limitations, the plaintiff replied, that she was beyond sea, and a feme covert. Rejoinder, that she was not beyond sea; that she was the wife of *George Dougherty*, at the time the money was received, and continued such until his death. It was agreed that the defendant should have the full benefit of all objections to this plea of coverture, as if he had specially demurred. There was a plea of deficiency of assets. The plaintiff offered to prove by a witness, *William Canonge*, an advocate of *Louisiana*, stating his knowledge of the law of *Louisiana*, before and after its cession to the *United States*, in the year 1791, and generally when that colony was under the dominion of the king of *Spain*, and who is likewise conversant in the laws which have been enacted under the territorial and state government, that by such writing the wife might legally contract with the husband for such property as she held in her paraphernal right; and that all her property was paraphernal, except that which

(Tougherty v. Snyder.)

was settled by marriage contract, which was dotal. That by those laws, she could lend it or let him have the use of it. That there was nothing in the *Spanish* laws in any way to invalidate such contracts, but, on the contrary, they were valid, and that as well by the old *Spanish* laws as by the laws now in force, the wife had at the time of the dissolution of the marriage an action against the husband or his heirs, for the restitution of all the property which she brought in marriage, either dotal or paraphernal, and which the husband may have had the use of, and that to that effect the law raises and gives to the wife, or her heirs, a mortgage on the property of her husband. This evidence was objected to, on the ground that it was to prove the laws of a foreign country by parol. No allegation was then made that the law was founded on written edicts, or that it was other than the unwritten law of the country. I admitted the evidence, reserving the points, and the first matter to be decided is, whether this was competent evidence. Our courts are not bound to notice the laws of *Spain*. The way of proving foreign laws, is by admitting them to be proved as facts, and the court must assist the jury in ascertaining what the fact is. *Mostyn v. Fabrigas*, 1 *Cowp.* 145. The unwritten laws must be proved by the testimony of persons acquainted with them, by public history, or by cases decided. But an edict registered must be proved by a copy under the national seal, or by a sworn copy collated by a witness; and in this, as well as in every other case of trial of fact, the best evidence which the nature of the case will admit of must be produced; that is, the evidence in the power of the party producing it. This rule of evidence applies to foreign laws, as it does to the other facts. *Church v. Hubbard*, 2 *Cranch*, 236. Thus one may prove by parol a contract, but if it be shown to be in writing, the writing must be produced. When this evidence was received, there was not a suggestion, much less any proof, that the law stated by Mr. *Canonge* was other than the unwritten law of the country. These laws are generally difficult of proof. It would be a very expensive matter to prove them by copies authenticated. It therefore shall reasonably fall on the party objecting to the parol proof to show that the law was a written edict of the country. Reason and public convenience, the just administration of the law, require this. We need not go abroad, and look for decisions in other countries, for it was decided in the highest court in our own country, in *Livingston v. Maryland Insurance Company*, 6 *Cranch*, 274, that if foreign laws are not proved to have been in writing public edicts, they may be proved by parol. There can be no difference whether it be a law regulating trade, or a law on any other subject:—the rule, from its nature, is universal. It is, therefore, the opinion of the court, that this evidence was properly admitted.

This disposes of the first and second reasons assigned, as causes for new a trial. But if the defendant now had shown a written law

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of *Spain*, an edict different from the law as stated by Mr. *Canonge's* deposition, which proved that the defendant had been injured, and that that had been received as the law which was not the law: this would have been good ground for granting a new trial. After this evidence had been received, Mr. *Duponceau*, counsel for the plaintiff, produced the *Digest of the Civil Law of Louisiana*, published by the legislature in 1808, not for the purpose of proving that the law, with respect to the rights of married women, was law of positive enactment, but to show, that it was the law before the cession of *Louisiana* to the *United States*; not that it was then first enacted. And the book clearly proved this; for that book does not purport to be original enactments, but a digest of the whole body of civil law; a *codification*, not new enactments. But a *Spanish* work is produced, which the defendant says does prove that it was the law,—the written law, or edicts. The book is called *Recopilacion de las Indies*. It does contain chapters on espousals, and some incidents of marriage: but his counsel did not pretend another law, another edict on this subject variant from the law as stated from Mr. *Canonge*. In truth and in fact, the laws, as stated by that gentleman to have existed in *New Orleans* in 1791, and ever since, I take to be the *Roman* civil law: for the laws, as he stated it, was precisely as in the digest of 1808, and the *Napoleon Code*: so that it is nothing more than a compilation. In pages 385, 396, the law of *Louisiana* is given on this subject nearly in the words of Mr. *Canonge*, and the *Napoleon Code*. Mr. *Griffiths* states, in the third volume of his *Register*, 674, this digest of the civil law to be now in force in *Louisiana*; and, in the *Appendix*, (page 700,) that this digest was chiefly modelled on the civil law, in some respects raised by local usages and territorial acts, passed at the time of its compilation; by which laws *New Orleans* was regulated at the time of its cession. But there seems to be a difference of opinion. The late President *JEFFERSON*, in his pamphlet on the *Batture*, says, they were the laws of *France*, and when *Spain* obtained possession in 1769, the changes introduced were chiefly in organizing the government, but little in jurisprudence. In pages 23 and 24, he asserts, that the great system (page 21,) which regulates property, the rights of persons or things, was the *French* law, and the *Spanish* law leaves the rights of the people untouched. This is denied by Mr. *Livingston*, in his answer to the pamphlet, who contends that the *Recopilacion*, or *Digest of the Laws of Castile and the Indies*, is the system. Chancellor *KENT*, in his commentaries on the laws, page 421, observes that the great body of the *Roman* and civil law, as well in some of the *European* countries, as in the new states of *Spanish America*, in the province of *Lower Canada*, and in one of the *United States*, (*Louisiana*), is the basis of the unwritten common law. He refers to the civil code of *Louisiana*, as published in 1823. And that civil com-

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mon law is now taught and obeyed, not only in *France, Germany, Holland, and Scotland*, but in the islands of the *Indian Ocean*, and on the banks of the *Mississippi* and *St. Lawrence*." Page 482. In the *Scotch* cases on marriage, brought up by appeal before the House of Lords, the depositions of the learned in the law were resorted to as evidence of the law of *Scotland*. In *Pre. Ch.* 208, an agreement in marriage between two *French* people in *France*, touching the wife's fortune, was ordered to be executed. It was the agreement it should go according to the custom of *Paris*, and evidence was given of that custom. This was a bill by the wife's relations, many years after her death, to have the benefit of the contract, and it was so ordered. And in 1 *P. Wms.* 431, on a marriage contract in *Holland*, the same law was held, but that it must be proved what were the laws of *Holland*. There has been nothing produced on the argument of this matter, to show that any law, written or unwritten, prevailed in *Louisiana* at the time of this contract, different from that stated by Mr. *Canonge*. His deposition stands uncontradicted. It is fortified by the *Digest of Louisiana* of 1808, and by the *Napoleon Code*. There is therefore no reason to direct another trial on this ground.

The fourth reason assigned is, evidence discovered since the trial. It must be a case under very peculiar circumstances, that would warrant the court to grant a new trial for this cause. But here the new-discovered witness was the sister and legatee of the testator: a person directly interested in the event of the cause, and all she attempts to prove is the death-bed declaration of the testator. This has not been urged on the court; indeed no argument could be raised on it.

The fifth is because the letter of the plaintiff to the executor before payment made by him to the legatees, absolves him from all charge of *devastavit*. The payment to the legatees was not compulsory, but voluntary. It was within the year, and if the executor chose to pay it without taking a refunding bond with security, he must blame himself. If he trusted the legatees, he should suffer, and not the creditors. Besides, it is no answer for the executor to say, I paid over to the legatees. It is a *devastavit*; unless indeed the creditors had acted deceptiously, or encouraged or connived at the payment. The correspondence shows nothing of this kind, and the suit was commenced with great celerity. All was done within the year.

The seventh cause is, that the plaintiff never having resided out of *Louisiana* since her marriage, and the husband never having resided in *Louisiana* since the year 1791, the plaintiff is barred by the act of limitations from having the right to bring the action, notwithstanding the coverture. This is connected with the third; which is, because the judge charged that no length of time whatsoever, unaccompanied with other circumstances, was sufficient to

(Dougherty v. Snyder.)

raise a presumption of payment, or satisfaction of the debt. I stated to the jury, that the time would not begin to run during the coverture of the plaintiff, and the suit was brought six years after discovery. That it was a case of positive enactment: the time of the statute, and nothing short of that, was a bar. That time had expired after discovery. The jury would, if there were such circumstances as satisfied their consciences that the money was paid, find for the defendant. The circumstances would not have warranted a finding of payment. On the words of the instrument, the parties had a view to his death before his return from that voyage; his representatives were to pay it to her. He never did return, and the event has happened on which it was to be paid to her. But, according to the evidence and the law, this money was recoverable by the wife or her heirs, on the dissolution of the marriage, and an action would lie by such heirs for the restitution of the property, and there are counts in the declaration so stating the contract. But if the money were immediately payable, I do not think that the statute would bar. The argument is, that she might have filed a bill in chancery against her husband, she being a citizen of another state in the Circuit Court of the *United States*. Two answers may be given to that: First, a wife cannot be a citizen of another state: her domicile is the domicile of her husband, her settlement is his. They are but one body; and though it may be that in a Court of Chancery a wife might file a bill against her husband, yet the bill would not lie in any court of the *United States*, because she never would be considered as a citizen of another state; and, as citizens of the same state, it is not quite clear that one could file a bill personally against the other. In the chancery cases, it will be found that she might file a bill for appropriating a fund in which the husband would necessarily be a party; but it is believed she could have no personal decree to recover money from him. But be this as it may, the case is expressly provided for by the fifth section of the act of limitations. She falls within the very letter of that provision. "If such person, at the time of the action accrued, be within the age of twenty-one years, a feme covert, &c. the same person shall be at liberty to bring the same action, so as they take the same within six years, as are hereby before limited, after they come of full age, discovery, &c." It is not incapacity to sue that suspends, and preserves the right: for infants might sue, lunatics and persons beyond sea. It is, however, contended, that if this matter could be sustained at all, the wife might have brought it in the *Pennsylvania* courts of common law. It has not been denied, that if the testimony of Mr. *Canonge* was credited, the contract was a valid one; and it is just to observe his deposition had been long taken. The defendant was apprised both of the evidence and the law, and that it was to be proved by parol; and, if there had been other or different laws, he had full opportunity to

(Dougherty v. Snyder.)

disprove this testimony. Whatever may have been the flexible opinions in *England*, about the right of married people, it is there settled finally that the wife cannot sustain an action against the husband. The good old common law is restored. It was the common law of that country, at the time of the revolution, and is now the common law there, as it always has been here. In *Marshall v. Rutter*, 8 *Term Rep.* 545, it was settled by the opinion of all the judges, that a feme covert cannot contract and be sued as a feme sole; though she be living apart from her husband, having a separate maintenance secured to her by deed. Lord KENYON, who delivered the opinion of all the judges, says it was asked, whether after separation, the wife could be convicted of felony committed in the presence of her husband?—whether they could be witnesses for or against each other? and whether they could sue or take each other in execution? Many other questions will occur to every one, to which it will be impossible to give a satisfactory answer; for instance, it may be asked how it can be in the power of any persons, by their private agreements, to alter the character and condition which by law results from the state of marriage: and for them to confer rights of action and legal responsibilities by such alteration, or how any power short of the legislature can change that which by the common law of the land is established as the course of judicial precedent. The course is to have the intervention of trustees. The law was so laid down by this court, in 10 *Serg. & Rawle*, 208. In case of abjuration, banishment, or transportation of the husband beyond sea, she may be sued or she may sue as a feme sole; because that amounts to a civil death. Even transportation for a term of years has been considered as a case of some difficulty, with respect to the enjoyment of the husband's estate, both real and personal. This contract, as to its legal construction, must be governed by the laws of *Louisiana*, as they were when it was entered into, and when the marriage took place. The plaintiff has proved, that this was a valid contract; but the mode of redress must be according to the laws of our forum. Our act of limitations governs as to time: it governs in the form of action; and in the consideration of the grade of debt, whether specialty or simple contract. It is a simple contract debt, barrable according to our act of limitations, and the remedy is in this form of action. I say barrable,—but it is not barred.

The last objection remains to be considered: it is, that if it be the law, that the wife cannot sue the husband, she cannot sue her husband's executors; but if this be a contract where the day of payment is postponed until the death of the husband, then the right of action is only suspended. There are numerous decisions to this purpose; and it would not follow, that if it were payable immediately the debt was extinct; the remedy only is suspended, and one, among many other reasons for this is, that the husband and wife form but one body; but on his death, she being the sur-

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vivor, has all the right not extinguished by the marriage; and therefore her husband being dead, this can cause no strife between them. She may sue his executors. Like the settlement of a pauper, the right is suspended during his life, but revives on his death: or privileged persons, the remedy against them is suspended until the privilege ceases. Aliens, during war, the right of action is suspended: on the return of peace, it revives. In the case of 1 *Ray*, 515, in which a feme sole takes a bond of a man she intends to marry, to leave her one thousand pounds at his death, Lord HOLT was of opinion that the debt was extinguished; but TOURTON and GOULD were of a different opinion. And GOULD said that the bond was not extinct, but might subsist by the rule of law; for the law does not love that rights should be destroyed; but, on the contrary, invents fictions to support them, such as abeyance; and the law never will work a release, since there are two rules of law which would be broken by the destruction of the agreement: First, *Modus et conventio vincunt legem*. Secondly, That the law will not work a wrong; and a suspension of rights does not always work an extinguishment. He observed that the law does not work an absolute extinguishment. In the 26th *Hen. 8th*, it is held, if there be a divorce, the wife shall have her goods again; and FITZHERBERT and NORWICH put the case of a bond by the husband before coverture, and said although there was a suspense during the coverture, yet after the divorce she might sue him upon it. It does not follow, because for certain reasons the right may be qualified, and recovery suspended during the coverture, yet when the reasons are removed by the death of the husband, she should have no remedy against the executors. The opinion of TOURTON and GOULD have prevailed over Lord HOLT's; and modern judges have lamented that Lord HOLT should have had recourse to flimsy and technical reasoning, so evidently against law and conscience. In fact, the controversy here is between the wife and the husband's relations; for the plaintiff agreed, and the verdict is so taken, that all the husband's debts, specialty and simple contracts, shall be paid, in the first place, out of the assets. It is an honest claim, and there is no legal impediment in the way of recovery. It is doing what the husband declared should be done, a restoration by his relations of the money held by him in trust for the wife. And I am not certain whether a Court of Chancery on marriage, in *England* would not decree the same thing to be done. In 3 *P. Wms.* 317, where a husband voluntarily and after marriage allowed his wife for her separate use to make profit of butter, poultry, &c., out of which she saved one hundred pounds, which the husband borrowed, and died, ordered that the wife should come in as a creditor, especially there being no defect of assets to pay debts. It was said by the Chancellor, the strongest proof of the husband's consent that the wife should have a separate property in these savings, is that he had applied to her, and

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prevailed on her to lend him this sum; in which case he did not lay claim to it as his own, but submitted to borrow it as her money. As to the difference between *Pennsylvania* and *Louisiana* interest, the point was not made on the trial, nor was it worth making, for the plaintiff will not get the principal. It is, however, agreed to be taken according to the interest of *Louisiana*. That being done, the rule is discharged.

Rule discharged.

[PHILADELPHIA, JANUARY 8, 1827.]

LEWER *against* The COMMONWEALTH.

IN ERROR.

It is not constructive larceny if one by fraudulent means induces another to part with the property in goods, and to deliver the possession of them absolutely: this description of larceny is confined to cases where the party intended only the delivery of possession.

THIS case came before the court by writ of error from the Mayor's Court of the city of *Philadelphia*; at the last *December* sessions of which court, *M. D. Lewer*, the plaintiff in error, was indicted for larceny in stealing the goods of *David H. Davis* and *Benjamin Oakford*, trading under the name of *Davis* and *Oakford*. The jury found a special verdict, setting forth that the said *M. D. Lewer*, in the month of *October*, 1825, went several times to the store of the said *Davis* and *Oakford*, and by various false and fraudulent pretences did procure from the said *Davis* and *Oakford* sundry dry goods belonging to them, of the total value of two hundred and ninety-six dollars and fifty-five cents; that he falsely represented to the said *Davis* and *Oakford* that he was the agent for his brother *E. Lewer* of *Morristown, New Jersey*, for whom he wished to purchase goods; that he subsequently laid off some of goods, falsely pretending that they were for the said *E. Lewer*, which goods were charged by the said *Davis* and *Oakford* to the afore-said *E. Lewer*, and the receipt of *Davis* and *Oakford* given as from the said *E. Lewer*, and the goods, when packed, marked with *E. Lewer, Morristown, New Jersey*; that he subsequently exhibited to the said *Davis* and *Oakford* a letter, which he said was written by the said *E. Lewer* to him, purporting that *E. Lewer* had transmitted to the said *M. D. Lewer*, the sum of three hundred and fifty dollars, to pay for the goods which the said *E. Lewer* had authorized the said *M. D. Lewer* to purchase for him, and that the said *M. D. Lewer* had the bill for the same made in the name of *E. Lewer*, and told the said *Davis* and *Oak-*

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ford that he had deposited the above sum of three hundred and fifty dollars in the *Southwark* Bank of the county of *Philadelphia*,—whereas it appears that no such person as *E. Lewer* existed, and that no money had been transmitted, or deposited in bank; but that the letter was forged and false, and written by the said *M. D. Lewer* himself, with the intent, and for the purpose of defrauding the said *Davis* and *Oakford*, and obtaining fraudulently the possession of their property; and further, that the said *M. D. Lewer* fraudulently delivered to the said *Davis* and *Oakford*, after bank hours, a false check drawn on the *Southwark* Bank in the county of *Philadelphia* for the sum of three hundred and fifty dollars, for which the said *Davis* and *Oakford* gave their receipt to *E. Lewer*, and the said check being for more money than the value of the said goods amounted to, the balance was delivered to the said *M. D. Lewer* by the said *Davis* and *Oakford*;—that the said *M. D. Lewer* had no money in the said bank, and never had kept any account there;—that by this series of false and fraudulent pretences he did unlawfully and dishonestly obtain possession of the goods of the said *Davis* and *Oakford*, with the premeditated design and intent wilfully to defraud and cheat them of their property, and without any intention of ever returning the same to the rightful owners. And that having thus fraudulently obtained the said goods, he eloped from the city of *Philadelphia*, and went to *New York*, taking the said goods with him, where he was afterwards arrested with the said goods in his possession. The jurors found the said *M. D. Lewer* to have perpetrated all the acts herein enumerated, with a deliberate premeditated design and intention to defraud the said *Davis* and *Oakford*; and having found the facts, they submitted the question of law to the decision of the court; and if the court should be of opinion that the offence committed by the said *M. D. Lewer* be a larceny, the jurors did in that case find the said *M. D. Lewer* guilty of larceny in manner and form, &c.; but if the court should decide that it was not a larceny, then they found that the said *M. D. Lewer* was not guilty. Upon this finding, the court was of opinion that the prisoner was guilty of larceny, and passed sentence on him accordingly.

Owens, for the plaintiff in error, argued, that in this state there never has been such a crime as constructive larceny; it is still necessary that the goods should be taken against the will of the owner in order to constitute a larceny—and if the law in this respect has been altered in *England*, it has been by cases decided since the 4th of *July*, 1776, which have, therefore, no binding authority in this state. The doctrine of *constructive* offences is a dangerous one, and ought to be rejected by the courts, as leading to great confusion and difficulty in the administration of the penal laws. With respect to larceny, the rule by which to determine the nature of the offence is, that if the property passes there can

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be no larceny; and he contended that in this case, Messrs. *Davis* and *Oakford* had clearly parted with the property in the goods delivered to *Lewer*; and therefore, however fraudulently he may have acted, he cannot be said to have taken the goods without their consent; consequently, the property passed to him, and he was not guilty of a larceny. He cited *Russell on Crimes*, 1055 to 1062; and referred to two cases similar to the present, in the Mayor's Court. in which the aldermen composing that court, (*READ*, Recorder, *dissented*,) had ruled the offence to be larceny.

Pettit, for the Commonwealth, replied. that he did not intend to support the judgment of the court below upon any new ground of *constructive* offences: he was altogether opposed to the construction by either court or jury, of any acts into felony, which by the settled rules of law did not amount to felony; but he wished to prevent having that construed into mere misdemeanor, which by established law amounted to felony—there had been, he thought, a misconception in regard to what has been of late termed *constructive larceny*—construction to a certain extent had been necessary ever since crimes had been the subject of definition: thus, there had always been a constructive breaking in burglary, a constructive putting in fear in robbery, and a constructive taking in larceny: in the present case he submitted that there had been such a taking of the goods as by *construction of law* amounted to a *felonious* taking. He entered on an analysis of the definition of larceny; *obtrectatio rei alienæ fraudulenta cum animo furandi, invito domino*; and contended that upon this ancient definition, as found in *Bracton*, the plaintiff in error was guilty of felony; that connecting the true import of the terms *invito domino* with the *animus furandi*, it was good law to say, that though there be a delivery by the owner, yet if there be clearly a fraudulent intent and no change of property, the crime of larceny is consummated. He went into a consideration of that class of cases in which the facts were held not to constitute larceny, in as much as the *property* was not parted with, or meant so to be by the owner; and also of that class in which the facts were adjudged larceny on the ground of felonious intent, and that the possession only, not the *property*, had been parted with. The present case, he contended, belonged to the latter class; and, to show that the *property* had not passed, he cited cases to prove that an action of *trover* or *replevin* might be supported, to recover the goods thus fraudulently obtained. He argued, too, that even the *legal possession* could not be said to have been parted with, because such possession follows the legal right of property; and, further, that even if the prosecutors intended to part with the property in the goods, it was to *E. Lewer*, a person who had no existence, and not to the plaintiff in error. Besides, he urged the importance of measuring the degree of guilt in this, as in all other offences, by the intent existing in the mind of the party

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accused, rather than by the intent of the party injured. Upon the whole case, he submitted, that if the distinction between the *property* and the *possession* could be so applied here as to avail the plaintiff in error, the result would seem to sanction the principle, that a half executed deception would amount to a felony—but a perfect, skilfully finished fraud, would constitute no offence punishable by the law. He cited, 4 *Bl. Com.* 11. 2 *Russell*, 1031, 1045. *Archbold's Crim. Law.* 119. 4 *Mass.* 502. 15 *Mass.* 156, 359. 16 *Mass.* 151. 17 *Mass.* 606. *Russell*, 1068, 1978.

Biddle, for the plaintiff in error, in reply, was stopped by the court.

The opinion of the court was delivered by

TILGHMAN, C. J. (after stating the special verdict and judgment of the court below.) It is of the essence of larceny that the taking be *invito domino*, without the will of the owner. *Fost.* 123. 4 *Bl. Com.* 230. 2 *East, C. L.* 665. The ancient known definition of larceny, says *Foster*, is *fraudulenta obtrectatio rei alienæ invito domino*. *Fost.* 124. The question is, then, whether the defendant took and carried away the goods of the prosecutors *against their will*? To a person unacquainted with legal subtleties, it would seem strange to make it a question whether, after a sale and delivery of goods, and a receipt given for the price of them, the vendee could be said to take them away *against the will of the vendor*? The argument on behalf of the prosecution is, that the consent of the vendors was fraudulently obtained, and therefore, in law, it was no consent; and the defendant, having from the beginning an intent to get possession of, and carry away the property without paying for it, was guilty of larceny. The consequence of this principle has such an important bearing on society, that it must be well considered before it is adopted. The cases in favour of it in the *English* courts, if any such there be, are since the *American* Revolution (4th *July*, 1776,) and therefore no authority here. But although our legislature has forbid the citing of such cases in our courts, yet it was never so unwise or so illiberal, as to wish to restrain the judges from deriving useful information from the opinions of learned foreigners of all nations. I have, therefore, had the curiosity to run through the *English* decisions on questions similar to that before us, and it really appears to me that their judges have so entangled themselves in the nicety and minuteness of their distinctions, that their best elementary writers are unable to reconcile the adjudged cases: and this must ever happen, when courts of justice endeavour to provide remedies which should be left to the legislature. This error has often been fallen into by men of the first talent and strictest integrity. Indignation is naturally excited by acts of flagrant villainy, and a judge thinks himself justified in taking one step beyond the line to come at the of-

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fender. But this step is not easily retraced; the case is urged on him as a precedent, and a new principle, once established, leads to so many unforeseen consequences, that at length the court endeavour to escape from them by distinctions too nice for comprehension; and thus the law becomes confused and uncertain—an evil always to be deprecated, but particularly in *criminal* cases. So much for the progress of the *English* law, since our revolution. But there are adjudications, prior to that period, which are authority, and by which, unless manifestly wrong, we have always held ourselves bound.

It was a principle of the common law in the earliest times, that its provisions were not to be evaded by fraud and artifice. A memorable example of this was given in a case in the 13th *Edw.* 4, mentioned by *Kelyng* in his *Reports of Pleas of the Crown*, 81, 82. One bargained with another to carry some packs of goods to *Southampton*, and delivered the goods to him. The carrier took them to another place, and there opened the packs, and took the goods, and disposed of them to his own use. The case being one of difficulty, was referred by the king and council to all the judges in the Exchequer Chamber, who resolved it to be felony. The reason of this decision was, says *Kelyng*, because the carrier's subsequent act of carrying the goods to another place, and then opening them and disposing of them to his own use, "*declareth the intent originally was, not to take the goods upon the agreement and contract of the party, but only with a design of stealing them.*" This case has been often cited, and always held for law. And it has been said that if the carrier had not broken the packages, but disposed of them entire of his own use, it would not have been felony. The reason of this distinction is very refined, but shows the anxiety of the judges that a breach of trust should not be construed into a felony. They would suffer nothing short of an opening of the packages to be sufficient evidences of such a *fraudulent original intention*, as would constitute a felony. And it has never been denied, that if the original intention of the carrier had been to take the goods upon the trust intended by the owner, and he had afterwards changed his mind, and converted them to his own use, it would have been but a breach of trust, and no felony. *Kelyng* mentions also another case of an unsuccessful fraudulent attempt to evade the law in a capital case. Some persons, under pretence of robbery, raised a hue and cry, and called a constable to search a house in the night time, and the constable coming, the owner of the house opened the door, and then, those persons bound the constable, and those in the house, and robbed them. This was burglary, because they procured the door to be opened to them in the night by fraud. There are other ancient authorities, establishing the principle, that if the owner of goods parts with the possession for a particular purpose, and the person who receives possession, avowedly for that purpose, has a fraud-

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ulent intention to make use of the possession as the means of converting the goods to his own use, and does so convert them, it is felony.

Such was *Chissers's* case, reported in *T. Raymond*, 275. 2 *East*, C. L. 275. *Chissers* asked the price of some cravats in a shop, the owner told him the price was seven shillings, and handed them to him to look at; *Chissers* took the cravats, offered three shillings, and then ran away with them: this was felony.—*Tunnard's* case was determined in 1722, and cited from a *M. S. note*, 2 *East*, 687. *Tunnard* borrowed a mare from *Smith*, to ride three miles; but, instead of three miles, he rode from the *Isle of Ely to London*, and there sold her. *Lord Raymond* left it to the jury to decide whether *Tunnard* took possession of the mare with the original intent to ride her only three miles, and then return her, or to steal her. The jury were of opinion that the intent was to steal, and it was held to be felony. Now, in all these cases, and others which it is unnecessary to mention, the owner of the goods had no intent to part with the property, but only the possession for a particular purpose; so that when the felon, pretending to receive them for the same purpose, harboured the secret design of stealing them, it has not been thought straining the law too far, to say that a possession thus fraudulently obtained was void, and the legal possession remained in the owner.

But when the owner intended to part with the *property*, the case is different. For although fraudulent means may have been used to induce him to part with it; yet he delivered the possession absolutely, and the purchaser received the possession for the express purpose of doing with the goods what he pleased. The owner was not deceived by the manner in which possession was taken. It was his intent that the possession should never return to him. Therefore it was a case of *cheat*, and not of *felony*. I find it laid down by *East*, a writer on criminal law of respectable character, "that if the owner parts with the *property*, by whatever fraudulent means he was induced to give credit, it is not felony." I have seen no judicial decision, which is authority in this court, carrying the doctrine of what may be called *constructive larceny*, beyond the case where *possession* only was intended to be delivered.

And I am for stopping there, because we have a line distinctly marked, which is of great importance in criminal law. If it be said that it is equally criminal to prevail on the owner to part with the property by fraud and falsehood; I answer, that granting it to be so, it is not for the court to punish actions according to the degree of immorality. That is the province of the legislature. There is an insuperable objection to the extension of the law by courts of justice. What they decide must be taken to have been law before their decision; so that a man may be, in effect, punished by an *ex post facto* law. Whereas the legislature takes care, when it creates an offence, to confine it to *subsequent* actions. I confess

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my own opinion is, that the law of felony has been pushed quite far enough, by the adjudged cases on possession fraudulently obtained. I am alarmed at the consequences of the principles now contended for. The argument is, that a fraudulent contract is void; therefore the property never passed from the owner; and as the property draws to itself the legal possession, the possession never passed from him, in contemplation of law. Let us see to what this may lead. A man, in contemplation of insolvency, purchases goods with an intention never to pay for them. Here is a fraud; is it therefore to be a larceny? Or suppose a man purchases goods, and makes payment in a bill of exchange which he knows will not be honoured—that too is a fraud. Is it a larceny? Again, a man purchases goods, and pays for them, and, on examination, finds them to be damaged, he offers to return them; and rescind the contract, on the principle of the seller's having known them to be damaged when they were sold. Perhaps he may be able to make this out to the satisfaction of a jury, and thus avoid the contract. Is it to be said, in that case, that the seller had an original intent to defraud the buyer of his money, and was therefore guilty of larceny? No, will be the immediate answer of the counsel for the commonwealth, and there is no danger of any man's being improperly convicted of felony, because the jury are to decide whether the intention was felonious. But juries have sometimes their passions and their prejudices. There are times when the public mind is strongly excited, and juries are hurried away by the common feeling. A man is thrown into a tremendous uncertainty, who has nothing to trust to, but the opinion which a jury may form of his secret intention; a matter, of which, after all, they can have no positive or certain knowledge. All cheating is immoral, but its degrees of guilt are very different. Let the legislature, if it thinks proper, declare the offence, and prescribe the punishment.

Now to come to a conclusion;—the defendant in this case deceived the prosecutors most shamefully. But he did obtain their consent to an *absolute* sale, and the possession was delivered accordingly. There was no condition in the case. When *Davis* and *Oakford* were imprudent enough to receive the defendant's check, they knew that it was not money. But such as it was, they accepted it in payment, and went so far as to give cash for the amount by which it exceeded the price of the goods. I say not, whether the property passed legally to the defendant, or not; but it is beyond doubt, that *Davis* and *Oakford* intended to pass the property when they delivered the possession, and, therefore, it was not a case of larceny.

I am of opinion that the judgment of the Mayor's Court should be reversed, and judgment entered for the plaintiff in error.

Judgment reversed.

[PHILADELPHIA, JANUARY 8, 1827.]

ROTH and another *against* MILLER and another.

IN ERROR.

Pleas payment with leave and conditions performed, with leave &c., replication, issue, &c. is a good joinder of issue after verdict.

In a suit on a bond of indemnity, if the *narr* sets out the condition to be, to keep the plaintiff indemnified against certain bonds, describing them, and breach in not so doing, pleas of payment, and conditions performed, admit the bonds as stated. It is error to leave to the jury the construction of writings.

Sureties are as much bound by the true intent and meaning of the instrument to which they are parties as principals.

ERROR to the Court of Common Pleas of *Northampton* county.

The plaintiffs in error, *Peter Roth* and *John Roth*, were also plaintiffs below, and *Jacob Miller* and *Jacob Bauer* defendants. There was a third defendant, *George Keim*, as to whom the sheriff, (being permitted to amend his return,) returned *nihil habet*.

The action was debt upon a bond, in which the obligors were called executors of the estate of *Conrad Roth*; the penalty of which was three thousand nine hundred and sixty-two dollars, sixty-nine cents, and the condition as follows. "Whereas *David Musselman*, by seven certain obligations bearing even date herewith, together with the said *Peter Roth* and *John Roth*, standeth bound unto the heirs of the said *Conrad Roth*, in the above sum of three thousand nine hundred and sixty-two dollars sixty-nine cents, current money of *Pennsylvania*, aforesaid, to be paid by seven instalments, which said money is to be paid by the said *David Musselman*, his heirs, executors, and administrators, now the condition of the above obligation is such, that if the said *David Musselman* shall pay or cause to be paid the said above-mentioned debt or sum of three thousand nine hundred and sixty-two dollars and sixty-nine cents, on the days and times mentioned in the said several obligations, to the said heirs of the said *Conrad Roth*, deceased, and if the said *Jacob Bauer*, *George Keim*, and *Jacob Miller*, their heirs, executors, and administrators, shall from time to time, and at all times hereafter, keep harmless and indemnify the said *Peter Roth* and *John Roth*, their heirs, and assigns, their goods and chattels, lands and tenements, of and from all suits, payments, costs, and charges of and in behalf of the said above recited obligations to the heirs aforesaid, without any fraud or further delay, then the above obligation to be void, or else to be and remain in full force and virtue."

The declaration stated the penalty, recited the obligation, and assigned breaches, viz.

1. That *David Musselman*, had neglected and refused to pay the said debt, of three thousand nine hundred and sixty-two dollars and sixty-nine cents, to the heirs of *Conrad Roth*; by means

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whereof *John Roth* and *Peter Roth*, were forced to pay divers sums of money.

2. That the said obligors, have not kept harmless and indemnified the obligees; but, on the contrary, they aver that one of the heirs had recovered a judgment against the said *David Musselman*, *John Roth*, and *Peter Roth* before a magistrate, which was founded and rendered upon one of the said seven obligations; and that two others of the heirs, viz. *Conrad Roth*, (his assignee, *George Siess*,) and *Daniel Roth* had each instituted suits in the Common Pleas, upon two of the said bonds, each of them for one thousand four hundred and forty-four dollars forty-four cents, and both of which were due and unpaid, when said suits were brought. By reason of which said breaches, said writing obligatory became forfeited and action accrued &c. &c.

To this *narr Bauer* and *Miller* pleaded payment with leave, &c. to which there was a replication of *non solvit* and issue: afterwards they pleaded "conditions performed, with leave to give the special matter in evidence, and leave to add, alter, or amend;" there then followed the words, "Replication and issues."

Upon these pleadings the parties went to trial, and there were verdict and judgment for the defendant.

Upon the trial, several questions were put to the court, by the counsel for the plaintiffs, with a request to charge the jury thereon. *Inter alia* they were requested to direct the jury. "That if the jury believe that the bonds given in evidence, although not precisely described in the condition of the bond, on which the above suit is brought, were the bonds against which it was intended that the plaintiffs should be indemnified, it is sufficient to support that part of the plaintiffs' cause."

The court charged as follows: "The court are of opinion that under the will of *Conrad Roth*, deceased, the executors of the last will and testament of the deceased had a right, with the approbation of the widow, to sell his real estate. The general rule of law is, that executors and trustees shall not be permitted to purchase at their own sale,—this is the general rule. But there are exceptions to it; and it is now the law of *Pennsylvania*, that if at a sale by executors, a third person purchase the lands for them, if the sale has been open and fair, and the lands struck off at a fair price to such third person, the sale is valid.

The parties appear to have transacted this business in relation to this estate very singularly. It would rather appear from the testimony, that *Jacob Bauer* was employed by *David Musselman* and *John Roth* to purchase the land for them. Previous to the sale, which took place on the 13th of *April*, 1816, *David Musselman* and *John Roth* entered into an agreement with *Jacob Bauer* to purchase the land for them, at the sale, restricting him, however, to the price of forty-eight dollars per acre. At the sale, however, he bid forty-nine dollars seventy-five cents, and the

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premises were struck off to him at that price. On the 26th of *August*, 1816, a deed was executed by *John Roth*, *Peter Roth*, and *David Musselman*, the executors of *Conrad Roth*, deceased, to *Jacob Bauer* for the tract of land which contained one hundred and fifty-four acres and twenty-eight perches, for the consideration of seven thousand six hundred and seventy dollars and twenty cents. On the same day he conveyed to *David Musselman*, one hundred and twenty-two acres and sixty perches, for the consideration of six thousand and eighty-eight dollars and forty-one cents, and two pieces containing together thirty-one acres, and one hundred and twenty-eight perches, to *John Roth*, for one thousand five hundred and eighty-two dollars and five cents; which sums together make up the consideration expressed in the deed from the executors to *Jacob Bauer*. They took it at the same price at which *Bauer* purchased. For the part which *John Roth* took he gave a bond with *Daniel Schaback*, as his security. Why was not this course adopted, as to the part which *David Musselman* took? For his part, he, *John Roth* and *Peter Roth*, entered into bonds to pay the purchase money, and then this wretchedly drawn bond of indemnity was taken. They have gone most strangely to work about this. For some of the purchase money *Musselman* gave his bonds with *John* and *Peter Roth*, as security; for some with *Peter Roth* as security, and for some with *John Roth* as security. And then *Peter Roth* and *John Roth* took from *Jacob Bauer*, *Jacob Miller*, and *George Keim* the bond of indemnity on which this suit was brought.

The defendants allege that this bond of indemnity was improperly obtained. *David Musselman* has been examined as a witness.

[Here the judge recited *David Musselman's* testimony and *David Sautee's* and *Matthias Gross's*.] You, gentlemen, must consider whether the parties were aware of what they were doing, when they executed this bond of indemnity.

The condition of the bond must be construed strictly in favour of sureties, (here the court read the condition.) We are bound by the condition, and it must be construed according to the words contained in the condition. The obligations produced do not correspond with the words of the condition.

1. Because the bonds are not to the heirs of *Conrad Roth*, deceased. But one of them is executed by *David Musselman*, *Peter Roth*, and *John Roth* to *Daniel Roth*; another by the same to *Christian Roth*; another by the same to *Henry Bauer*; another by the same to *Jacob Roth*; another by *David Musselman* and *John Roth* to *Peter Roth*; and another by *David Musselman*, *Peter Roth*, and *John Roth* to *John Demuth*. The condition of the bond would imply that each bond was payable to the heirs of *Conrad Roth*, deceased.

2. The sums mentioned in these bonds which have been pro-

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duced, do not correspond with the sum mentioned in the condition of this bond of indemnity. Four of the bonds are for seven hundred and twenty-two dollars and twenty cents each, one for eight hundred and five dollars and forty-five cents, one for two hundred and ninety dollars and three cents, and one for two hundred and forty-two dollars and eighty-two cents. The law will not permit us to substitute any other than those mentioned in the condition.

If this bond of indemnity had been drawn in a proper manner, and had recited each bond as it existed, it would then have been your duty to take into consideration the damages which the plaintiffs have sustained, and it would not in that case have been necessary for the plaintiffs to prove that they had given notice to the defendants of the damnification. Your verdict in that case would have been for the balance of the bonds mentioned in the condition, and the court would have exercised a controlling power over the verdict so as to have done justice to all the parties concerned.

But we think this bond of indemnity is drawn in so miserable a manner, that the sureties are not responsible for the bonds given in evidence. They vary essentially from the bonds enumerated in the condition.

If the jury should think that the bonds given in evidence, are not the bonds enumerated in the condition of the bond of indemnity, then their verdict should be in favour of the defendants. But if they should think that the bonds given in evidence, are the bonds described in that condition, then their verdict should be for the plaintiffs, on the principles before stated.

This charge was excepted to; and a bill of exceptions duly signed. The errors now assigned were,—

1. The pleadings do not present any issue, capable of being tried.
2. The court erred in their charge.

1. In directing the jury, to consider whether the parties were aware of what they were doing when they executed the bond of indemnity.

2. In their principles relative to the construction of the condition of the bond of indemnity, and in adopting a strict construction in favour of the sureties.

3. In their actual construction of the condition.

4. In the general tenor of their charge, subsequent to the part first above said to be erroneous.

Scott, for the plaintiff in error.

1. There was no issue. The pleadings did not deny the breaches assigned in the declaration. 2 *Johns. Rep.* 413.

2. The charge of the court was erroneous. The court instructed the jury that they must consider whether the defendants knew what they were about, when they signed the bond of indemnity. There was no issue which brought this matter into question. Considering all the docket entries, the first plea of payment with leave, &c. was abandoned.

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3. The charge of the court on the construction of the bond was wrong. The court said it must be construed strictly, because the obligors were securities; and they said that the breaches were not supported, because the condition of the bond given in evidence differed from that set forth in the *narr*. The pleas confessed the bonds as set forth in the *narr*. *Cro. Eliz.* 757. 5 *Bac. Ab.* 480. *Willes*, 9, 25.

Tilghman, contra. The record is very defective, in not containing the evidence on which the court charged. The cause was fairly tried on its merits.

1. There are several issues on the record;—one on the plea of payment: another on the plea of condition performed.

2. The defendant may plead inconsistent pleas, one of which may seem to admit the cause of action, but another may deny it. There was evidence that the obligors did not understand *English*, and were deceived as to the contents of the bond; the court, therefore, properly left to the jury, “whether the defendants knew what they were about.”

3. The court left it to the jury to say whether the bonds produced in evidence were the same as the bonds mentioned in the condition.

Scott, in reply. As to the merits, it is certain that the plaintiff became security for a third person, and the defendants were bound to indemnify them; that the plaintiffs have been damnified and that the defendants have escaped on technical grounds and objections. The court did indeed leave to the jury, whether the bonds described in the breaches were the same as those produced in evidence, after having misled them by a misconstruction in matter of law, which compelled them to find a verdict for the defendants. For if the construction of the court was right, the bonds certainly were not the same. The plaintiffs’ breaches were confined to two of the bonds given to the heirs of *Conrad Roth*. The judge certainly did tell the jury that each of the seven bonds ought to have been given to all the heirs of *Conrad Roth*; or at least he so expressed himself as to leave it doubtful whether this was not his meaning: and thus the jury would be bewildered, if not absolutely misled. The judge does not say that any one of the bonds was given to a person not one of the heirs of *Conrad Roth*.

The opinion of the court was delivered by

DUNCAN, J. This case does not come up in the most lucid order. It takes some pains to relieve it from the obscurity, in which on a first view it appears to be involved; but, when it is understood, it presents a very clear case.

It was an action on an obligation of indemnity, reciting that *David Mussleman*, by seven certain obligations, bearing even date herewith, together with *Peter Roth* and *John Roth*, did stand bound to the heirs of *Conrad Roth*, deceased, in the sum

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of three thousand nine hundred and sixty-two dollars, to be paid in seven instalments by the said *David Musselman*, conditioned that if the said *David Musselman* should pay the said sum of three thousand nine hundred and twenty-six dollars and sixty-nine cents, on the days and times mentioned in the said obligations, to the said heirs of the said *Conrad Roth*; and if the said *Jacob Miller* and *Jacob Bauer*, (the obligors,) shall from time to time, and at all times, keep harmless and indemnify the said *Peter* and *John*, their heirs and assigns, their goods and chattels, lands and tenements, of and from all suits, payments, costs, and charges, of and in behalf of the said recited obligations, to the heirs, assigns, &c. then the obligation to be void. The plaintiff assigns in the declaration two breaches,—1st, That *David Musselman* had neglected and refused to pay the said debt of three thousand nine hundred and sixty-two dollars and sixty-nine cents to the heirs of *Conrad Roth*, by means whereof the plaintiffs were bound to pay divers sums of money: 2d, That the said obligors have not kept harmless and indemnified the obligees, but, on the contrary, one of the heirs had recovered a judgment before a magistrate, which was founded on and rendered upon one of the said seven obligations; and that two others of the heirs, viz. *Conrad Roth* (*George Seiss*, his assignee,) and *Daniel Roth*, had each instituted suits in the Court of Common Pleas upon two of the said bonds, each of them for one thousand four hundred and forty-four dollars and forty-nine cents, and both of them were due and unpaid when this action was brought, by means whereof action accrued, &c.

Sufficient appears on this record to show, that the seven bonds were the purchase money of a tract of land of *Conrad Roth*, and sold by his executors, and that a several bond was given to each heir, for his own part, and not general bonds to all the heirs for their instalments. The pleas were, payment with leave, &c., and conditions performed with leave, &c.,—replication, issue, &c. There is nothing in the objection as to want of issue. In *Brown v. Barnet*, 2 Binn. 74, the Chief Justice referred to a case decided in this court in *December*, 1806, (*Myer v. Perry*), where the plaintiff assigned breaches in the declaration, the defendants pleaded covenants performed and *non damnificatus*, and then followed the words, and issue; and this was held a sufficient joining of issue. I can only say for myself, that I would be deaf to an objection of the want of replication, where the parties go on to trial as if issue was joined, on the plea of covenants performed; or where the bond is for performance of conditions, conditions performed, the defendant, on notice, may give that evidence, which he might have pleaded. *Bender v. Fromberger*, 4 Dall. 439. And so held in the Circuit Court of the *United States* for this district, in *Webster v. Warren*, April, 1810. *M. S. Rep. Whart. Dig.* 141. What I understand by this is, that it puts every thing in issue, in the notice of a defence, which protects the defendant, but it admits the

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execution of the deed set out, and of conditions expressed: it admits that he did enter into the condition set forth in this assignment of breaches in the declaration, but pleads performance of them, not of any other condition, but of the very conditions; for it is an invariable rule in pleading, that whatever is alleged by one party, and not denied by the other, is admitted. *Douglass v. Blair*, 2 Binn. 78. And even a verdict which contradicts a fact admitted in the pleading is disregarded. 3 *Cranch*, 270.

The breaches assigned in this declaration are, that the bonds by which the plaintiffs were damnified were the bonds respectively given to the heirs of *Conrad Roth*, deceased. The plea admits these were the conditions, but says they have saved the defendant harmless. If the law be so, then all the inquiry as to which these bonds were was idle, because the nature of the conditions was not put in issue. It was admitted by the pleading, and the defendant put himself upon the country on another fact, performance of the conditions.

No doubt, under our practice, on these pleas, the defendants might have shown imposition and fraud in obtaining these bonds from ignorant and illiterate men; but in the way in which the court put this to the jury, the jury would naturally conclude that whatever might have been the fact, the plaintiffs could not recover on account of the variance, the bonds not being given to all the heirs of *Conrad Roth*, conjunctively, but to each heir separately, and for his own part; for they expressly say, the condition of the bond would imply, that it was only to indemnify against joint bonds given jointly to all the heirs of *Conrad Roth*, and the law would not permit a substitution of any others, that is, bonds given to each heir for his part; and the court leave the jury in no doubt, for they say, "We think the bond of indemnity drawn in such manner, that the securities are not bound for the bonds given in evidence." Now, this was an opinion on the construction of a deed, which was matter for the court, and not for the jury; and the reasons given by the court are, that they vary essentially from the bonds enumerated in the condition. It was an opinion on the penning of the bonds, on the construction of a written instrument, exclusively the province of the court. It is not put to the jury on mistake in drawing the bonds, or imposition practised on the defendants, but that, in point of law, this instrument did not bind the defendants to indemnity against these bonds; in other words, it was not in the bond. Now, in that, I think there was manifest error. It will be observed, that the bond of indemnity recites that it bears date with these bonds; that absolute bonds were given to secure the purchase money of the land to those to whom it belonged; and that those persons who brought suit on those bonds, and to whom they were given, were the respective heirs of *Conrad Roth*. The miscalculation, in adding up the total sum, would not vary the construction, or show that there were or might be

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other bonds. It is difficult to conceive how it could be that there were other and different bonds. The action was one continued act,—simultaneous,—part of the arrangement. The bond for instalments, then before the scrivener, recites the bonds, but for brevity sake, instead of recapitulating each bond to each heir, designates them generally as the bonds given to the heirs.

Without the agreement of *Miller* and *Bauer* to indemnify the plaintiffs, they never would have entered into these obligations. These defendants were the principals in this bond of indemnity: the plaintiffs were the security of *Musselman*, the defendants their back bail, a term well understood in the country; and, if the construction put on the instrument be the legal one, then it provides for nothing; if these are not the bonds intended, there can be no others. The court seemed to have no doubt of the real intention, but considered it so wretchedly drawn as not to affect the design. They even seem to be of opinion, that as they considered the defendants as sureties, it should be construed differently from the same words binding a man for his own debt; and, although it may be admitted that bonds are not to be construed strictly against sureties, yet securities are as much bound, according to the true meaning of the obligation, as principals. In 6 *Yeates*, 340, and 4 *Dall.* 79, Judge SMITH has laid down the true principle of construction to be, *that the surety is not liable further than the true intention and meaning of the parties expressed in the instrument, and the legal construction of the words used make him liable; but so far he is liable, and the legal construction of the words make him answerable.* All who bind themselves in a bond are equally obligors; and there are many cases, in the construction of bonds, where the letter of the condition has been departed from, to carry into effect the intention of the parties. 3 *Cranch*, 235, shows a strong instance of a construction of this kind. And it is a rule in the construction of all deeds, that they are to be construed most strictly against those who make them, and most favourably by those for whose benefit they are made, as every contract is. They are to be construed with relation to the subject-matter and design, and to the apparent object of the parties.

In case of sureties, the instrument is not to be extended by implication, but construed according to the scope of the terms used. 9 *Wheat.* . So construing this bond, the court entertain no doubt of the intention of the parties, sufficiently expressed in the condition, and that it does contain an indemnity against the bonds given to the heirs respectively. The counsel for the plaintiffs mistook the ground, in requesting the court to leave the construction of this instrument, as a matter of fact, to the jury. This court has on many occasions decided, that leaving a question of law to the jury, to be decided as a matter of fact is error, as much as it is er-

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ror for the court to take the facts from the jury, and to decide on them as if they were matter of law.

It was quite inconsistent to say, that the implication of law in the condition was, that each bond should be payable to the heirs of *Conrad Roth*, and that the law would not permit any thing else in substitution; and to instruct the jury that the bond of indemnity was so wretchedly drawn that the securities were not answerable for the bonds given in evidence; and then to leave it to the opinion of the jury, to find that they were the very bonds described in the bond of indemnity; and, if they so find, then to give the verdict for the plaintiffs: but, if they did not so find, then for the defendants. The question was a question of law,—the construction of the bond. The court decided it first as a question of law; (and thus, as I conceive, mistook the legal construction, the manifest intention, sense, and meaning;) and, after that left it to the jury to decide on their own opinion, as a question of fact, contrary to what they said was the legal construction. This appears to the court to be a plain and palpable error, and the judgment is for this reason reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[PHILADELPHIA, JANUARY 8, 1827.]

LEIPER *against* W. LEVIS, O. LEVIS, and SAMUEL GARRET, Administrators of LEVIS.

Philadelphia Bank *against* Same.

Philadelphia Bank *against* LEIPER.

IN ERROR.

A judgment creditor of an insolvent intestate cannot gain a priority over other judgment creditors by taking out against him, and levying on his goods a *fiери facias* which relates to a day prior to the intestate's death. Such *fiери facias* and levy are good where the estate is solvent.

THIS was a writ of error to the Court of Common Pleas of *Delaware* county, where the respective parties agreed, that these cases should be united, and the annexed statement be considered in the nature of a special verdict, found on the trial of each of these cases by a jury sworn to try all the issues joined between the different parties. If upon this statement of facts, the court should be of opinion that *Thomas Leiper* was entitled to the proceeds of the sale

(*Leiper v. Levis and others.*—*Philadelphia Bank v. Leiper.*)

by the administrators, their judgment to be entered in his favour in the suit against the administrators for the amount of the sales so made by the administrators, and judgment to be entered in the two subsequent suits in favour of the defendants. But if the court should be of opinion that the *Philadelphia Bank* was entitled to the whole of the money now in the hands of the administrators, after deducting physic, funeral expenses, and servants' wages, then judgment to be entered for the *Philadelphia Bank* on the first count of the declaration in the suit against *Thomas Leiper*, and also in the suit against the administrators for such sales, and judgment to be entered in favour of the administrators in the suit of *Leiper* against them. But if the court should be of opinion that neither the *Philadelphia Bank* nor *Thomas Leiper* are entitled to the whole of the proceeds, or to the money remaining in the hands of the administrators, but only to a *pro rata* distribution of the money remaining after payment of physic, funeral expenses, and servants' wages, then judgment to be entered in favour of the plaintiffs in the first and third suits, for the respective amounts to which they shall be entitled, on a *pro rata* distribution, and judgment to be entered in the second suit in favour of the *Philadelphia Bank*, on the second count of the declaration.

Case stated for the opinion of the court, and to be considered as if the facts had been found by a special verdict.

On the 21st of *May*, 1817, a judgment was entered by agreement against *William Levis* in favour of the *Philadelphia Bank*, for the sum of eight thousand one hundred and eighty-eight dollars, in the Supreme Court for the Eastern District of *Pennsylvania*. On the 14th *December*, 1818, *Thomas Leiper* entered a judgment against the said *William Levis* in the Court of Common Pleas of *Delaware* county, upon a bond and warrant of attorney, dated the same day, for eight thousand dollars, conditioned for the payment of four thousand dollars, as security for notes endorsed by the said *Leiper*, for the said *Levis*, and then becoming due. On the 9th of *May*, 1819, the said *Levis* died intestate, leaving personal estate in *Delaware* county, to the amount returned in the inventory hereinafter mentioned, and on the 18th day of the same month, letters of administration of the goods and chattels rights and credits, which were of the said intestate at the time of his death were granted to *William Levis*, *Oborn Levis*, and *Samuel Garret*. On the 24th day of the same month, a writ of *fieri facias* issued out of the Court of Common Pleas of *Delaware* county, returnable to *July* Term, 1819, upon the judgment of the said *Leiper*, directed to the sheriff of *Delaware* county, and was delivered to him on the same day; the said *Leiper* had previously to the issuing of the said execution taken up and discharged all the notes for which his said judgment was a security as aforesaid. The sheriff, in pursuance of the said writ, proceeded in the manner

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stated in this affidavit, which is annexed and made a part of this case. The said administrators filed an inventory of the personal estate of the said intestate, in the Register's Office of *Delaware* county, on the 7th day of *June*, in the same year, amounting agreeably to appraisement to the sum of four thousand two hundred and eighty-four dollars and ten cents. On the 8th day of *June* in the same year, the following agreement in writing was entered into between the agent of *Thomas Leiper*, and the administrators of *William Levis*.

<i>Thomas Leiper</i> v. <i>William Levis.</i>	}	<i>Fieri Facias</i> to <i>July</i> Term, 1810, <i>Delaware</i> county, Common Pleas.
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It is agreed, that the administrators of *William Levis*, deceased, may proceed to inventory and sell the personal estate of the said deceased, notwithstanding the above execution, holding the proceeds of sale, subject in the first instance, to the rights the plaintiff has already acquired under the execution.

June 8, 1819.

George G. Leiper,
Attorney for *Thomas Leiper*.

<i>Samuel Garrett,</i> <i>Oborn Levis,</i>	}	Administrators.
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No part of the said personal property ever was in the actual possession of the sheriff of *Delaware* county, nor sale of the same ever made by him, nor any of the proceeds of the said property ever came to his hands, nor has the said writ of execution ever been returned by him. The said administrators, in their names as administrators, proceeded to advertise and sell part of the said personal property at public vendue, and the residue thereof was sold by them as aforesaid at private sale to various individuals; the amount actually received from the said personal estate by the said administrators in money is - - - - - \$1208,04½

They hold securities for personal estate sold to the	
amount of - - - - -	1800,00

\$3008,04½

The said administrators have actually paid for physic, the funeral expenses, and servants' wages, of the deceased, three hundred and seventy-five dollars and sixty-four and a half cents, which payments were made since the 8th *June*, 1819, a part of the above, viz. one hundred and seventy-seven dollars and fifty cents, was recovered from the administrators, as servants' wages, in the action of *Bailey v. Levis's* administrators, in this court, No. 53, to *July* Term, 1819. The said administrators are indebted for office fees, and for professional services and advice, in an amount which they estimate at \$——. At the time of the decease of the said intestate

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no other judgment, except the two first above mentioned, of the *Philadelphia Bank*, and *Thomas Leiper*, was entered against the said *William Levis*. On the 10th day of *January*, 1822, the judgment of the *Philadelphia Bank* was revived against the administrators of *William Levis*, and on the 13th day of *June*, in the same year an *alias testatum fieri facias*, issued on the said revival, out of the Supreme Court of the Eastern District of *Pennsylvania*, returnable the last Monday of *July*, 1822, directed to the sheriff of *Delaware* county, and was delivered to him the next day. The said execution was regularly served by the sheriff on the said administrators, but no levy was ever made.

Sheriff's affidavit, above referred to:—

<i>Thomas Leiper</i>	}	<i>Fieri Facias</i> to <i>July</i> Term, 1815.
v.		
<i>William Levis.</i>		

Robert Fairlamb being affirmed doth depose and say, that at the time the above writ of *fieri facias* was issued, he was high sheriff of the county of *Delaware*, that the said writ was delivered to this affirmant on the 24th day of *May*, 1819, as appears by his indorsement on the same; that a short time after he received the writ, not many days after, he served it on one of the administrators, he thinks *Samuel Garret*, but no actual levy was made or inventory taken of the property; but his impression is, that it was to be considered by the parties as though an actual levy had been made; that he understood the administrators and the plaintiff were about to enter into an agreement by, which the administrators were to proceed to make sale of the property of the intestate, and he was informed, not long after, that such an agreement had been made; after which he gave himself no further no further concern about the writ, but held the same in his possession until it was called for by *S. Edwards*, the plaintiff's counsel, when he delivered the same to him.

Affirmant further says, that when the said writ was delivered to him, he was instructed to serve the same, but not to proceed to make sale of the property until he received further instructions from the plaintiff or his counsel.

Affirmed and subscribed }
July 15th, 1822, before }
Samuel Smith, J. P. }

Further saith not
Robert Fairlamb.

Judgment was entered by the court below in favour of *Thomas Leiper*, against the administrators of *William Levis*, deceased, of *July* Term, 1822, for a *pro rata* distribution of the monies remaining in the hands of the defendants after payment of physic. funeral expenses, and servants' wages.

Kane, for the plaintiff in error, now contended that *Leiper* had obtained a preference by the *fieri facias* issued in his suit tested

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in the lifetime of *Levis*, and levied on his goods in the hands of the administrator; citing statute 29 *Car. 2. c. 3, s. 15, 16. 2 Bunbury*, 271. 2 *Ray*, 850. 7 *Mod.* 93. *S. C. 3 P. Wms.* 398, 399. 1 *B. & P.* 571. *T. R.* 20, *note*. The practice was established in *Pennsylvania* to levy on goods in the hands of administrators, by virtue of a *fieri facias* tested in the testator's lifetime *Lewis v. Smith*, 2 *Serg. & Rawle*, 142. *Fitch v. Ross*, 4 *Serg. & Rawle*, 557. He also referred to 1 *Cowen*, 33, 34. 9 *Mass.* 214.

Read and *Tilghman*, contra, insisted that it was the character of the debt at the death of the intestate, that governed its right to payment out of the assets, and that no levy under a *fieri facias* or relation to its teste, could contravene the distribution provided for by the intestate act, 3 *Sm. Laws*, 148. This point was so decided by the late President WILSON, in *Burton v. Johnson*, and is recognised in *Welsh v. Murray*, 4 *Dall.* . *Wootering v. Stewart's Executors*, 2 *Yeates*, 483. *Prevost v. Nichols*, 4 *Yeates*, 479. *Scott v. Ramsey*, 1 *Binn.* 221. *Ex parte Meason*, 5 *Binn.* 174. *Bell v. Newman*, 5 *Serg. & Rawle*, 85. *Griffith v. Chew*, 8 *Serg. & Rawle*, 30. Besides, no actual levy was made on *Leiper's* execution. Actual levy before the return day was necessary. To show the meaning of the word levy, they referred to *Hodgkiss v. M'Vicker*, 12 *Johns.* 403. *Hendricks v. Robinson*, 2 *Johns. Ch.* 312. *Hagerty v. Willer*, 16 *Johns.* 287. *Engel v. Osburn*, 1 *Ray*, 320. *Case of Billington*, 1 *Wash. Rep.* 30. *Bradley v. Windham*, 1 *Wils.* 44. *Dewitt v. Smith*, 1 *Mass. Rep.* 309.

The opinion of the court was delivered by

ROGERS, J. The practice of *Pennsylvania* is too well settled to be now shaken, that a judgment may be entered, or execution issued, after the death of the defendant, and that the execution has relation to the first day of the preceding term. This legal fiction works no injustice between the parties themselves, or their legal representatives, and may be justified by the consideration that the practice facilitates the collection of debts, certainly due, from an estate, acknowledged to be solvent. If we were now, for the first time, to consider whether legal relations and legal fictions should be introduced, it would perhaps be wise to inquire into, and sift most minutely the foundations on which they were supported. This, however, is not a case where rights of the parties only are involved, but it concerns creditors, and the responsibility of administrators. It is the case of an insolvency, and an attempt, by means of a legal fiction, to deprive other creditors of a *vested right*. Justice, in such a case, would seem to require, that, upon an application to the court, an execution issued under such circumstances should be set aside, and the plaintiff put to his *scire facias*, which would afford the administrator an opportunity of taking defence to the action. Fictions were not intended to do injustice,

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nor should they be permitted to interfere with the operation of a most beneficial statute. By the 11th section of the act of assembly of 1794, *all debts*, owing by any person within this state, *at his or her decease*, shall be paid by the executors or administrators, in a manner therein prescribed. And, to the end that due regard may be had to *creditors*, it is provided, that no administrator shall be compelled to make distribution of the goods of any person dying intestate, until one year be fully expired, after the intestate's death. This act is directory, and imperative upon executors and administrators, and in terms includes all debts owing by the deceased, and, as they ranked, whether by judgment, bond, or simple contract, at the time of the death of the testator, or intestate. The right of the creditor became vested, to be paid in the order pointed out by the act, which the executors or administrators cannot vary, without a *devastavit*. What, then, is the matter submitted to the court, but an attempt, by means of a legal fiction, which was never in the contemplation of the legislature, to change the rights of creditors, by the mere act of issuing an execution after the death of the intestate. Establish the principle, contended for by the plaintiff in error, and it will be unsafe for an executor to pay the funeral expenses, servants' wages, the physician's bill, or indeed the necessary expenses of letters of administration, until the intervention of a term after the death. A creditor, with a warrant of attorney to confess a judgment, would have it in his power to sweep the whole estate, in prejudice of debts of equal or superior degree, contrary, as I believe, to the manifest intent and policy of the act of 1794. A judgment entered more than a year would be postponed to a debt, where there was a warrant of attorney to confess judgment, and that without the probability, by any legal diligence, of preventing it. One would be compelled to resort to a *scire facias*, whilst the other would enter his judgment, and issue immediately his execution, which would secure a preference for his debt. It was one among the many humane and benevolent purposes of this act, to prevent this legal scramble for the assets of deceased insolvents. And the more effectually to carry their intention completely into effect, the legislature have given the executor one year, that he may ascertain the assets, and make the legal distribution of the estate, in the manner there prescribed. I am the more confirmed in my views of this point, as it is sustained by the authority of the case of *Wood and Hopkins, Pennington's Reports*, 689, determined by the Supreme Court of *New Jersey*, where they have a similar act of assembly.

As my opinion is founded on the operation of the act of 1794, it would be an affectation of legal research, to examine particularly the *English* decisions, and point out in what respects they differ from the law of *Pennsylvania*.

Judgment affirmed.

[PHILADELPHIA, JANUARY, 8, 1827.]

**DURLING and Wife against NEIGH, Executor of NEIGH,
and others, terre-tenants.**

IN ERROR.

Agreement with the defendant, an executor, by the plaintiff, a legatee, to waive the legacy, in consideration of five hundred dollars to be paid to the plaintiff by promissory notes drawn by the defendants. The notes were drawn, and the plaintiff signed a paper, acknowledging he had received them, to be in full, "when paid," of all demands against the estate of the testator. *Held*, not to be a substitution of the personal responsibility of the defendant for that of the estate.

ERROR to the Court of Common Pleas of *Northampton* county, in an action of debt brought by *Andrew Durling* and *Susannah*, his wife, against *James Neigh*, executor of *Andrew Neigh*, deceased, and *James Neigh*, *Jeremiah Neigh*, and *James Henderson*, devisees and tenants of the lands of which *Andrew Neigh* died seised.

The plaintiff in error, who was also plaintiff below, declared for a legacy bequeathed to his wife by the last will and testament of *Andrew Neigh*, deceased, and charged upon the lands devised to the terre-tenants. The defendants pleaded payment with leave, &c.

The plaintiff gave in evidence, on the trial, the last will and testament of *Andrew Neigh*, deceased, dated 21st of *November*, 1815, proved 13th of *January*, 1816.

Caveat against the probate thereof, by *Samuel Neigh*, dated the 6th of *December*, 1815, withdrawn the 13th of *January*, 1816. The defendants having given the notice of special matter, dated the 11th of *April*, 1825, hereafter mentioned, proved the following receipt, signed by the plaintiffs, "received, *December* 7th, 1816, of *James Neigh*, executor of the estate of *Andrew Neigh*, deceased, his different notes for five hundred dollars, *when paid*, in full of all demands against the said estate of *Andrew Neigh*, deceased."

The defendants offered in evidence the record of a suit, *Andrew Durling v. James Neigh*, in the Court of Common Pleas of *Northampton* county, of *April* Term, 1824, No. 75.

To the admission of which the plaintiffs objected that it was not pertinent to the issue; that no notice had been given to the plaintiffs to produce the promissory note on which the said action was alleged to be founded; that the said suit or action was still depending, and that no notice thereof was given in the defendants' notice of special matter. The court overruled the objection, and admitted the record in evidence.

The following was the notice of special matter:—

In this action, under the pleas therein entered, the defendants

(*Durling and Wife v. Neigh, Executor, &c.*)

will offer evidence to prove that some time in the year 1815, or 1816, a settlement was made between the plaintiff, *Andrew Durling*, and *James Neigh*, one of the defendants; whereby it was agreed, that the said *James Neigh* should execute notes to the amount of four or five hundred dollars in favour of the said *Andrew*, payable at different periods, which when done should be in lieu of the devise contained in the last will of *Andrew Neigh*, deceased, in favour of the plaintiffs, and upon which this suit is founded; which devise amounted to the sum of seventy-five pounds. That the said notes have been actually executed and delivered to the aforesaid *Andrew Durling*, and accepted by him in full of the legacy or devise aforesaid, and have been since that time discharged by the said *James Neigh*."

The plaintiffs requested the court to charge the jury,—

1. That if a creditor takes a new security, of an equal or inferior degree from his debtor, it is not an extinguishment of the original claim.

2. That a note is not an extinguishment of a prior debt, unless it is expressly agreed by the creditor to receive it in payment and discharge of the original claim; nor would a judgment recovered on such note operate as an extinguishment, unless payment has been actually received on it.

3. That the legacy bequeathed to the wife of the plaintiff is a lien upon the lands of the testator, in the hands of the devisees and tenants; and, being so, a note or bond taken therefor would be a security of an inferior degree, and that the acceptance of such bond or note would not be an extinguishment of the legacy.

4. That as the receipt of the plaintiff to *James Neigh* for these notes declares, that "*when paid*" they will be in full of all demands against the testator's estate, such notes, in law, are only a collateral security for the legacy; and that a note taken as a collateral security, does not work an extinguishment of the preceding debt.

5. That the acceptance of a bond or note from *James Neigh* for the payment of money due by him and the other defendants, when they (the other defendants,) were not of the age of twenty-one years, does not impair or affect the right of the plaintiff to pursue the lands charged with the payment of the legacy.

Answers of the court:—

1. It is admitted that if a creditor takes a security of an equal or inferior degree from his debtor, it is not of itself an extinguishment of the original claim. But if such security is accepted as a payment or satisfaction of such original claim, it is a discharge of such claim; and whether such security has been so accepted is a question of fact, of which the jury are to judge, and decide under all the circumstances of the case.

2. A note is not an extinguishment of a prior debt, unless the creditor agrees to receive it in payment and discharge of the ori-

(*Durling and Wife v. Neigh, Executor, &c.*)

ginal claim. Nor would a judgment recovered on such note operate as an extinguishment of such prior debt, under such circumstances. But, if the creditor accepts such note, retains the same in his possession, and prosecutes an action on it against the debtor, and recover judgment, such acts are proper for the consideration of the jury, and an actual payment of the note is not indispensably necessary. The jury must be satisfied that the parties agreed that such note was accepted in satisfaction and payment of such original claim, otherwise it will not be a discharge of the original claim.

3. There is no doubt that the legacy bequeathed to the plaintiff's wife was originally a lien on the testator's lands in the possession of his devisees and terre-tenants. But the plaintiff, by accepting the notes of *James Neigh*, might discharge that lien, and if the jury are of opinion that the plaintiff, *Andrew Durling*, accepted the notes of *James Neigh* for five hundred dollars, in lieu and satisfaction of the legacy of two hundred dollars, such acceptance would operate, not as an extinguishment, but as an actual discharge of the legacy. Three notes of one hundred dollars each have been paid; *Andrew Durling* retains the the other notes. He has not offered to deliver up the last mentioned notes to *James Neigh*, but has sued out one of them and recovered a judgment upon it. Notwithstanding all these circumstances, the jury must be convinced that the parties intended to discharge and exonerate the real estate from the legacy.

4. The expression contained in the receipt of *Andrew Durling* to *James Neigh*, "that when paid they will be in full of all demands against the testator's estate," do not necessarily imply that the notes mentioned in the said receipt are only a collateral security for the legacy. *These expressions would only seem to have referred to the nature of the debt, for payment of which the notes were given.* A note given as a collateral security does not work an extinguishment of the preceding debt.

5. The defendants in this action were, at the time the notes were given by *James Neigh* to *Andrew Durling*, tenants in common of the lands devised by the will of *Andrew Neigh*, deceased. By *Andrew Durling's* acceptance of the notes of *James Neigh*, one of the tenants in common, his claim, secured by the notes became confined to the notes, and the legacy secured to *Susannah Durling*, his wife, by the will of *Andrew Neigh*, against all the tenants in common, was discharged, the infancy of the other tenants in common, to the contrary notwithstanding, if such was the agreement of *Andrew Durling* and *James Neigh*.

The following were the errors assigned;—

1. The court below erred in admitting in evidence the record of the suit *Andrew Durling v. James Neigh*; because the said record was not pertinent to the issue trying in this suit. No notice was given to the plaintiffs to produce the note on which that suit

(Durling and Wife v. Neigh, Executor, &c.)

was founded, the said suit was still depending, and the defendants gave no notice thereof in the notice of special matter given by him to the plaintiffs, as required by the 11th and 12th Rules of the Court of Common Pleas of *Northampton* county, title "pleading."

2. The court erred in their charge to the jury, as to the legal effect of the evidence given in the cause, and submitting to the jury as matter of fact for their consideration that which was properly a matter of law, and upon which the court should and ought, under the points propounded, to have given a legal opinion to the jury.

3. That the court erred in saying, that the acceptance of the notes as a payment or satisfaction was a discharge of the claim, when it was proved that the said notes were received to be in full only when paid. The court did not fully and correctly answer the first point propounded.

4. That the court did not charge correctly in answer to the 2d point, in saying that "if the creditor accepts such note, retains the same in his possession, and prosecutes an action on it against the debtor and recovers judgment, such acts are proper for the consideration of the jury, and an actual payment of the note is not indispensably necessary, &c.," nor has the court fully answered the said point.

5. The court erred in answering the 3d point, and in saying "*Andrew Durling* retained the other notes; he has not offered to deliver up the last mentioned notes to *James Neigh*, but has sued out one of them, and has recovered judgment upon it." That being a fact proper for the jury, and not for the court to determine; and the court have not fully answered the said point.

6. That the court erred in answering the 4th point, and in saying, "that the receipt of *Andrew Durling* to *James Neigh*, that when paid they would be in full of all demands against the testator's estate, does not necessarily imply that the notes mentioned in the said receipt are only a collateral security for the legacy. These expressions would only seem to have reference to the nature of the debt, for payment of which the notes were given." And the court have not fully answered the said point.

7. The court have not fully answered the 5th point, and have erred in not laying the point as stated, before the jury as law.

8. That there was error in recording a verdict and entering judgment for the defendants, on the finding returned by the jury.

9. That the jury were sworn to try the issue joined between the parties as they stood on the record; whereas *James Neigh*, one of the terre-tenants, had never appealed from the award of arbitrators made in the case.

Brook, for the plaintiffs in error.

Scott, contra.

The opinion of the court was delivered by

GIBSON, J. Although nine errors are assigned, there is really

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but one point in the cause. This practice of putting the same point in a variety of ways leads to a waste of time, and a silly repetition of the same arguments, and imposes an unnecessary burden on the judges of this court, (already tasked beyond the power of performance,) in seeking for two grains of wheat in two bushels of chaff. It is, however, but fair to say, that in this cause the counsel conducted the *argument* with great propriety; and it is to be understood that I speak of the practice generally, when I say it calls for severe reprehension. It is indefensible on the score even of caution, or a prudent attention to assigning the errors in such a way as to give the party the benefit of every sort of exception; for surely no counsel is so ignorant as to be unable to discern the substantial points of his cause, and if these be against him no turning or twisting, or shifting or management, will make them better. Here the plaintiff in error has one good point, and he should have been content to avail himself of substance without catching at shadows. It seems the validity of the will under which the plaintiff claims, was at one time disputed, but the parties agreed that all objections should be withdrawn, in consideration of five hundred dollars to be secured to the plaintiff by promissory notes drawn by the defendant. The notes were in fact drawn, and the plaintiff signed a paper in which he acknowledged that he had received them to be in full, "*when paid*," of all demands against the estate of the testator; and the court directed the jury that this was a substitution of the personal responsibility of the defendant, even before the notes should be paid, for the responsibility of the estate. In this there was such glaring error as to render further remark unnecessary. The judgment therefore is reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[PHILADELPHIA, JANUARY 8, 1827.]

KUHN *against* NIXON and another.

MOTION FOR NEW TRIAL.

Equitable principles are to be applied by a jury, under the direction of the court, in the same manner as legal ones; and the remedy, on motion for a new trial, is the same.

What circumstances will give to a separate debt of some of the partners the character of a partnership debt.

THIS cause was tried before the Chief Justice at *Nisi Prius* in *February* last, and a verdict was rendered in favour of the defendants. The plaintiff now moved for a new trial.

(Kuhn v. Nixon and another.)

It was an action for money had and received, and was brought by *Hartman Kuhn* against *Henry Nixon* and *Richard Willing*, to recover of them, as assignees of *James* and *John Gibson*, a rateable proportion of a debt which he asserted the defendants were liable to him for, and on the trial the circumstances appeared to be as follows.

On the 1st of *July*, 1813, articles of co-partnership were agreed upon between *Thomas Conaroe*, *Richard Conaroe*, *James Gibson*, and *John Gibson*, for five years, to carry on the lumber business in the name of *T. Conaroe* and Co. on premises situate on the river *Delaware* above *Philadelphia*, and owned by *J. and J. Gibson*: the capital ten thousand dollars, to be equally advanced by the parties, who were equally to share in the profit and loss: *Richard Conaroe* to devote his time to the lumber yard, and receive five hundred dollars a year for it, and each partner to give advice and assistance free of charge. *Thomas Conaroe* assigned his lease of the wharf, &c. on the premises, and *J. and J. Gibson* leased the wharf, meadow, &c. to the concern, at a rent to be fixed. The partnership went into operation, and in the fall of 1817, having about a million feet of unsawed timber on hand, *John Gibson* suggested to the other partners the purchase of a steam saw-mill owned by *F. Markoe*, which he was willing to sell, and stated that if he would take ten thousand dollars in lumber, it would be advisable to purchase it; to this they all agreed. The proposition being made to *Markoe*, he assented. A few days after, he said he had rather take a less price in money on a credit, and it was finally agreed to purchase the mill for eight thousand dollars on credit. Accordingly, on the 29th of *November*, 1817, *Markoe* declared he considered the Messrs. *Gibsons* sufficient for the purchase money, and conveyed the mill to *James* and *John Gibson* in fee, and took their bond and warrant, and a mortgage for the payment of the eight thousand dollars, on or before the 29th of *November*, 1820, with interest half yearly at the expiration of one year from the date. The property was held by *Markoe*, subject to a ground rent of six hundred dollars and upwards *per annum*. *Markoe* assigned the bond, warrant, and mortgage to the plaintiff, *Kuhn*, on the 8th of *December*, 1817, and the plaintiff entered up judgment on the bond in *February*, 1821.

On the 26th of *April*, 1819, an agreement to dissolve the partnership was signed by all the partners; the settlement of the affairs of the concern to be made by *James* and *John Gibson*; on the same day, *T. and R. Conaroe* assigned to *J. and J. Gibson*, reciting that they were indebted to them for money advanced, and conveyed to them, "their executors, administrators, and assigns, all the partnership stock, debts, goods, and chattels, and effects, and all the partnership estate whatsoever," to hold to the said *J. and J. G.* their executors, administrators, and assigns for their own use, &c. On the 28th of *April*, 1819, *J. and J. Gibson* assigned

(Kuhn v. Nixon and another.)

to the defendants in trust that they should, out of the proceeds of the assigned property, in the first place, pay "all the debts due and owing by the late firm of *T. and R. Conaroe and Co.*"

To prove that the saw-mill was in fact a partnership purchase, and the debt a partnership debt, the plaintiff relied upon evidence which he gave at the trial, that the mill was repaired and worked by the firm: that in an advertisement in *May*, 1818, by the firm, that the mill was ready to work and soliciting business, it was said to belong to the firm: the firm paid all expenses and received the profits without paying any rent to *J. and J. Gibson*: in 1818 the firm erected a wood house, and made alterations in the mill, and sawed lumber: they paid half a year's ground rent on the mill in that year, and interest on the mortgage to *Markoe*, from which and other circumstances they contended that it was the understanding of all the partners that the saw-mill was partnership property. They also gave in evidence conversations on the part of *Nixon*, one of the defendants, soon after the assignment, in which he gave directions concerning the management of the saw-mill, on behalf of the assignees; and the acts and entries of *John Gibson*, as agent of the assignees, in relation to the property, especially his paying interest on the mortgage. On the other hand, the defendants alleged that the saw-mill did not pass to the firm under the assignment, and adduced evidence to prove that the cost of the mill was never entered in the partnership books; that the mill was never worked after the assignment; that *John Gibson's* acts, as agent of the assignees, were never recognized by them: that *Nixon* acted without authority: that the creditors of the partnership, who were note-holders, released, upon a belief founded on papers and documents shown them by *J. and J. Gibson*, that the partnership effects were to be for the sole benefit of the note-holders; and that the assignees refused to receive from *J. and J. Gibson* a conveyance of the saw-mill, when tendered to them some short time after the assignment.

The Chief Justice instructed the jury fully as to the facts, and then gave his opinion on the points of law, as follows.

1. Did the interest of *T. and R. Conaroe* in the mill estate pass by their deed to Messrs. *Gibson*? My opinion is, that it did pass.

2. Did the mill estate pass by the deed from Messrs. *Gibson* to the defendant? My opinion is, that it did not pass.

3. Were the defendants estopped, by the payment of interest on the bond and mortgage, made to the plaintiff by *John Gibson*, their agent, from denying that this was a debt owing to the late firm of *T. and R. Conaroe and Co.* In my opinion, they were not estopped.

4. Supposing this to be a partnership debt, was the plaintiff precluded from a right to prosecute this action, by the judgment which he entered on the bond of Messrs. *Gibson*, in *February*, 1821? My opinion is, the plaintiff was not precluded from this action, by the entry of the judgment.

(Kuhn v. Nixon and another.)

5. Suppose the release to have been executed by the creditors to Messrs *Gibson*, in consequence of an error into which they had been led by misrepresentations of Messrs. *Gibson*, concealing from them that this was a partnership debt, would that affect the plaintiff's right of recovery.

OPINION. The plaintiff's right of recovery, if otherwise good, could not be affected by the supposed misrepresentations, although the releases to Messrs. *Gibson* would thereby be rendered void.

The Chief Justice then informed the jury, that their verdict should depend on a point which it was not for him to decide, viz. whether the debt due on the purchase of the mill, was a debt due from the late firm of *T. and R. Conaroe and Co.* As to that, he would lay down one or two principles of law. If the purchase was made *by the firm*, it might be considered as a debt due from the firm, though Messrs. *Gibson* had taken the deed to themselves, and given their own bond and mortgage to *Markoe*. So it might be considered as a debt due from the firm, if it appeared, by entries in the books of the firm, or other unequivocal conduct of the partners, that it was acknowledged by them as a debt due from the firm. To judge merely from the writings, viz. the conveyance to Messrs. *Gibson* by *Markoe*, and their bond and mortgage to him, it would not be a partnership debt. But the jury were to take into consideration the parol evidence given on the facts he had mentioned, and decide on the whole whether it was a partnership debt or not. If it was, their verdict should be for the plaintiff; but, if not, for the defendants. The jury gave a verdict for the defendants.

The plaintiff filed the following reasons for granting a new trial:—

1. Because the evidence produced in this cause was sufficient, in law, to prove that the debt due for the purchase of a steam saw-mill (and for which the plaintiff brought this action) was a co-partnership debt of *T. and R. Conaroe and Co.* and also to prove the plaintiff's right to recover the same from the defendants.

2. Because the said evidence was sufficient, in law, to prove that the said mill was the co-partnership property of the said *T. and R. Conaroe and Co.*, and was vested in the said defendants, in trust to pay the said co-partnership debt.

3. Because the court did not state what was the law and equity of the case arising out of the evidence, and charge the jury to find accordingly; but left the jury to collect the law and equity from the evidence.

4. Because the Court did not charge, that the debt for which the action was brought, was a debt of *T. and R. Conaroe and Co.* within the true meaning of the deed of assignment of *James and John Gibson* to the defendants, and that therefore the plaintiff had a right to recover.

(Kuhn v. Nixon and another.)

5. Because the verdict is against law and evidence, in this, that the debt contracted for the saw-mill was a debt of *T. and R. Conaroe*, and therefore the plaintiff had a right to recover.

The Chief Justice reported the case, and said that the cause turned upon the fact whether the plaintiff's debt was due from *Conaroe and Co.*, which he left to the jury,—that the fact was perplexed, and he should not have been dissatisfied, had the jury found one way or the other.

Condy, for the plaintiff. It is time for the court to take a more decided stand in charging juries in *equity* cases. Courts of chancery act, almost altogether, without a jury. The court ought to order a new trial, in all cases, where the jury have drawn an inference in matter of fact different from what a discreet judge would have done. This is the principle which I wish now to be established. The advertisement of *Conaroe and Co.*, that they had *purchased* the steam mill, amounted to a written declaration of trust, on the part of *Gibson*, that they held the property for the partnership. He then made two points.

1. Did the mill property pass by the assignment to the defendants?

2. Was the purchase money a partnership debt?

Condy made particular remarks on the evidence, in order to show that all the parties considered the mill, &c., as their property, and that Mr. *Nixon*, after the assignment to the defendants, considered the property as being vested in the assignees. He then referred to the authorities, to establish the principles for which he contended. *Gow on Partnership*, (2d Ed.) 47, 48, 254, 291, 308, 309, 310, 311, 312. 10 *Johns.* 505. 3 *Ves. & B.* 38, 40. 2 *Merrivale*, 37. 1 *Vern.* 390. Effects, in a devise, are synonymous with worldly substance, and include real estate. *Cowp.* 304, 307.

The *steam engine*, which was the chief value of the property, was *personal* property. It would have been wrong in Messrs. *Gibson*, when they made their assignment, not to take care that the partnership debts should be paid from the partnership property. They ought not to have paid their private debts out of the partnership property.

Binney, for the plaintiff. The opposite argument would destroy the present system of equity in *Pennsylvania*, and transfer all power from the jury to the court. The constitution gives the jury the power possessed by them *before*. The court decides the principles of equity by which the jury are to be governed. A new trial will not be granted, because it is a verdict *against evidence*, if the judge is not dissatisfied. 2 *Binn.* 108. 3 *Binn.* 317. 2 *Serg. & Rawle*, 134.

1. The steam mill property did not pass to the defendant.

2. As to its being a partnership debt, it was a *fact* for the jury.

3. The jury were right, that it was not a partnership debt.

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Binney went through the evidence, and commented on it.

The plaintiff has no equity against the defendants: he is assignee of a bond and mortgage given by Messrs. *Gibson*,—to them only he looked,—he never had the least communication with the *Conaroes*, nor in any manner trusted to them. The mill property was worth nothing, and therefore contributed nothing to the partnership stock.

1. The mill did not pass to the defendants: the deed has no words of *inheritance*. It speaks of personal property only,—it refers to a settlement between the partners, which does not mention it as part of their stock. As to third persons, at least, it was *real* property. *McDermot v. Lawrence*, 7 *Serg. & Rawle*, 438. It was never the intention of the defendants to *receive* this property.

2. The Chief Justice was right in submitting to the jury the fact, whether this was a *partnership debt*. To look to the writings, it was *not* a partnership debt. The evidence on which the plaintiff relied, was *parol*, and was necessarily left to the jury.

3. The jury decided right. The *original* contract was solely between *Markoe* and Messrs. *Gibson*. The seller conveyed to Messrs. *Gibson*, and received from them their bond and mortgage; and trusted to *them only*. It is dangerous to adopt certain equity principles, used in *England*, who settle these matters on a commission of bankruptcy, when we have no means of adopting their *whole system*.

Chauncey, for the defendants.—The plaintiff relies on three points.

1. The verdict is against evidence.
2. The court did not charge the law and equity of the case.
3. The court did not charge that it was a partnership debt.

The judge who tried the cause was *not dissatisfied*. This ought to be decisive; but the verdict was right. This debt was originally contracted on the credit of Messrs. *Gibson* only. If the separate liability of one partner is *originally* relied on, the *partnership* is not liable. *Gow*, 169, 170, 266. The firm is not bound, where the contract is made expressly on the credit of one partner. 3 *Chit. Com. Law*, 338, 339, 232. 4 *Esp. N. P. Rep.* 89. *Evans v. Drummond*, 3 *Price's Ex. Rep.* 542. *Eden's Bankrupt Laws*, 158. 15 *East*, 7. 3 *Barn. & Ald.* 89. A dormant partner is not liable, where the other partners *purchase land*, and take a deed to themselves. *Fritz v. Waugh*, 14 *Mass.* 424. *Clement v. Brush*, 3 *Johns. Cas.* 180. 2 *Marsh. Rep. (Kent.)* 285. If *Markoe* agreed to accept the bond and mortgage of Messrs. *Gibson*, he had no right to have recourse to *T. and R. Conaroe*, though he knew the property was purchased for the use of the partnership. In 2 *Johns.* 213, one of five partners gave bond to the *United States* for goods imported by the partnership,—the other partners held not liable. In this case, the suit was brought by the *surety of the obligor*, who had paid the bond to the *United States*. This mill

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property never came beneficially to the *firm*, nor could they have compelled Messrs. *Gibson* to have conveyed to them, having paid nothing for it and it never having been entered, as part of the stock of the firm, on their books. I deny, that the steam engine attached to the mill was personal estate: it could not be separated from the mill, which was part of the freehold.

Hopkinson, in reply. The verdict is contrary to law and justice. The Chief Justice did not say that he was satisfied, but that he was *not dissatisfied*. The cause was so perplexed, that had the jury found one way or the other, he should not have blamed them. Causes are better discussed on a second trial. The jury, in this case, have been perplexed by a mixture of law with the fact. There is reason to doubt whether justice has been done. The courts of *Pennsylvania* have in many instances led the way, which the *English* courts have followed. For example, setting aside a verdict where *vindictive damages* have been excessive. *Lyon v. Bank of Pennsylvania*. Again, in libels, the defendant was suffered to give evidence, in mitigation of damages, that he was not the original author of the scandal. *Kennedy v. Gregory*, and *Morris v. Duane*. The question is, whether the plaintiff is entitled to come on the fund in the defendants' hands, according to the deed of assignment; that is, was this a debt for which *Conaroe* and Co. were responsible? It is immaterial whether the steam mill was conveyed to the defendants or not, except by way of argument, to show that it was a partnership debt: so it might be a partnership debt, though the property was in Messrs. *Gibson* only. He contended, that the mill did pass to the defendants, and, if so, there was a misdirection in law, for which there should be a new trial. Real estate purchased for the use of a firm, and used in the business of the firm, is part of the stock in trade. If any payment has been made on account of the mill purchase, it has been from *partnership funds*. A *partnership creditor* may come on the partnership stock, though he has taken separate security by *specialty*, from one of the partners. If one partner borrows money *on his own credit*, and it can be traced to the partnership fund, it becomes a *partnership debt*. On these principles, the mill estate was *partnership stock*. In cases like this, a fee may pass without the word *heirs*. The deed to the defendants conveys all the partnership *effects*, which comprehends real estate. But, after all, the decisive question is, was this a partnership debt? He then argued, from the *evidence*, that it *was* a partnership debt. It was wanted for partnership purposes, and *originally* agreed to be paid for by the *lumber of the partnership*. It was afterwards so far altered, that the payment was to be of a *less sum* in money, but there was no other alteration, and the mill has been used for *partnership purposes only*. No *rent* was charged by Messrs. *Gibson* against the firm. *John Gibson* paid interest on this mortgage, as agent of the defendants, before any contest arose,

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which shows his sense of it. When the defendants made their first dividend, the *principal* of this debt was *not due*; but the *interest* had been paid by the *agent* of the defendants. The mill has contributed largely to the partnership fund, by sawing their logs, the boards made from which logs were sold, and the money brought into the partnership stock. The question was put too broadly to the jury, to decide whether it was a partnership debt, *as matter of fact*.

The opinion of the court, (HUSTON, J. being absent,) was delivered by

GIBSON, J. The principles which must guide, in motions for new trials, are the same whether the suit be an action strictly at the common law, or substantially a bill in equity. The rules of equity are as well defined and of as easy application by a jury, under the direction of the court, as are the rules of the common law. With us, equity and law are convertible terms; and no good reason has been shown for distinguishing between them in the exercise of judicial discretion. On the contrary, the course indicated would lead to the destruction of trial by jury altogether.

Whatever may be our opinion of the points on which the plaintiff mainly relies, there is an insuperable impediment in the way of his recovery. No construction, however liberal, can make him a creditor of the partnership; consequently, his debt is not within either the letter or the spirit of any of the trusts declared in the deed of assignment. On this head, cases in bankruptcy must be viewed with extreme distrust, and adopted, if at all, with great caution and many grains of allowance. The *English* courts have carried their construction of the contract of partnership to a length that would often have produced shocking injustice, had not that been prevented by forced constructions on the other side. Nothing can be more unjust in the abstract, than the right of the partnership creditors to a monopoly of the partnership funds; yet this was produced by holding the interest of each partner to be limited to what remains after the joint debts are paid; and hence a lien was created in favour of the joint creditors, for no equity peculiar to themselves, but to prevent the separate creditors from coming in to the prejudice of the other partners. To counteract this natural injustice, when both classes came before the chancellor under a commission of bankruptcy, he was compelled to give the separate creditors of the partners the same monopoly of their separate estates; and the interest of the separate creditors was further promoted by throwing on the joint fund all who could by any construction be declared joint creditors: as, therefore, the joint fund is usually the largest, and as those who were admitted to participate in it would make no objection, it is not extraordinary that we should have many cases in which creditors were let in on the joint fund, who had not trusted to it. Under the statutes of bankrupt-

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cy, this was all very well; but here, where we are under no necessity to take a course which would lead into difficulties or to resort to by-ways to extricate ourselves from them, it would show little foresight to follow the *English* decisions. We ought rather to suffer ourselves to follow the dictates of reason, and common sense, according to which it is impossible to say, that the credit in this instance was not given exclusively to the partnership. Mr. *Markoe* had undoubtedly been in treaty with the firm: but the matter was finally arranged by a conveyance to *James* and *John Gibson*, and a bond and mortgage from them as a security for the purchase money. There undoubtedly are cases where a partnership debt will not merge in the bond of one of the partners; but when it does not, it should clearly appear that the credit was originally given to the firm, and that the security afforded by the bond was intended to be cumulative; in the absence of proof of which, the bond must necessarily be considered as the principal, and the only debt. Here, however, the proof accords with the legal presumption; for it distinctly appears, that when Mr. *Markoe* conveyed the property to the Messrs. *Gibson*, and took their bond and mortgage for the price, he declared this was done because he thought them sufficient for the debt; thus intimating, that he relied on this security exclusively. After this, it is unnecessary to inquire into the view with which the property was purchased, or whether it has been applied to the purposes of the partnership. It is sufficient that the credit was given to the Messrs. *Gibson*; for Mr. *Markoe*, having thought proper to trust them originally, could never afterwards resort to the firm.

But if the law were otherwise, still the written contract showed any thing but a purchase by the firm; and if a joint liability existed in fact, it could be made only by extrinsic circumstances. Of these the plaintiff has had all the benefit to which he was entitled; but he complains of the direction, that the steam-mill did not pass by the deed of trust. In conveyances of this sort, I admit that words of inheritance are not indispensable where the purposes of the trust cannot be answered with less than a fee; but by the provisions of the assignment, (particularly the reference to the schedule and books of the partnership,) it is made plain that the parties had in view nothing but an assignment of the personal effects, and this construction is fortified by a variety of circumstances too minute to be recapitulated. The other parts of the case were left to the jury under a direction quite as favourable to the plaintiff as he had a right to expect. The Chief Justice charged, that if the purchase were made by *the firm*, the debt might be considered as still due from the firm, although the Messrs. *Gibson* had taken the deed to themselves, and given their own bond and mortgage for the price; and, as to this, the plaintiff, of all the parties concerned, had least reason to complain. As to the supposed mistake of the jury in point of fact, it is sufficient that the judge who tried

(Kuhn v. Nixon and another.)

the cause is not dissatisfied with the verdict, and, on a review of the evidence, I am inclined to coincide in opinion with the jury. On every ground, therefore, the defendants are entitled to judgment.

Rule to show cause discharged.

[PHILADELPHIA, JANUARY 8, 1827.]

The COMMONWEALTH, on the relation of CLEMENTS and others, *against* ARRISON and others.

INFORMATION IN NATURE OF A QUO WARRANTO.

Information in nature of a *quo warranto*, lies against persons acting as trustees of an incorporated church, but the court will grant or refuse it, according to circumstances.

A RULE was granted by the court, in this case, against *Matthew Arrison* and others, the defendants, to show cause why an information in nature of a *quo warranto*, should not be filed against them for exercising the office of "Trustees of the Ninth Presbyterian Church in *Philadelphia*." The defendants now objected, in the first instance, that the office they exercised was not the subject of an information of this description; and the point was argued by *P. A. Browne* and *T. Sergeant*, for the relators, (with whom was *Randall*,) and *Dwight* and *Binney*, for the defendants.

Arguments for the defendants. The ancient *quo warranto* issued where a franchise of the crown was usurped by an individual, and the king alone could proceed against the usurper. A franchise is defined to be a royal privilege in the hands of a subject. 2 *Bl. Com.* 37. *Finch*, 164, 166. 2 *Inst* 493, 496. 1 *Bulst.* 55. The extent of an information in nature of a *quo warranto*, is exactly the same as the ancient writ: it is not granted, except in cases where the writ lay. *Commonwealth v. Murray*, 11 *Serg. & Rawle*, 73, 74. 15 *Johns.* 387. The sole object of the writ was to resume the franchise which had been usurped. Therefore all the cases on this subject, collected by *Comyns* in his Digest, are of usurpation on the crown by exercising a public office. 6 *Com. Dig.* 157. 2 *Johns. Ch.* 377. It has therefore been decided, that an information of this kind did not lie in case of private rights, where no franchise of the crown has been invaded. It will not lie for erecting a warren. *Rex v. Sir William Lowther*, 1 *Str.* 637. Nor for forfeiture of the place of recorder by non-attendance. *Lord Bruce's Case*, 2 *Str.* 1161. Nor for claiming an exclusive right of ferry. *Rex v. Reynoll*, 2 *Str.* 1161. Nor in the case of churchwardens, *Rex v. Daubeny*, 2 *Str.* 1196; which may be considered

(The Commonwealth v. Arrison and others.)

a case strictly analogous to the present, and has been again decided in *England* since. See 15 *Johns.* 369. Such information lies not for holding court-leet, and the reason given is, that it is a private right, which may be tried in a civil action. *Rex v. Canes, Andrews's Rep.* 14. It will not lie for opening a road without compensation, 2 *Johns.* 190. The statute of *Anne* gave this remedy to private persons, and that statute does not extend to *Pennsylvania*. *Stat.* 9 *Ann. c.* 20. 3 *Bl. Com.* 264. 2 *Kyd on Corp.* 424. In the present case, there has been no usurpation of a franchise against the state. The state has granted the franchise, by charter under the act of 1791, and the only question is, which of the parties may exercise this franchise of being trustees of the corporation. Many of our corporations, under the act of the 6th of *April*, 1791, (*Purd. Dig.* 129,) are private corporations, and are so regarded both by our legislature and at common law; and, in the exercise of a sound discretion, even if the court have the power, they would only grant this writ in cases of offices which are usurped against the commonwealth, or the public are interested. 2 *Lord Raym.* 1409. *Cas. temp. Hard.* 347, 1 *W. Bl. Rep.*, are all cases in which informations have been refused on this ground, or granted on the ground that the offices were of public concern. Informations are not matters of course, but discretionary. 3 *Bac. Ab.* 644. *Hawk. P. C. book* 2, c. 26, sec. 9. *People v. Richardson, 4 Cowen*, 102. What power have these trustees, who are the object of the present dispute? They have the care of the church property, and are limited to temporalities; but the property is not in them. The public is no way concerned. They could not even support an ejectment. Let those pewholders who think the defendants improperly elected, pay their rent to the relators. There are probably not less than a thousand private corporations in *Pennsylvania*, and their disputes will drive all other business out of court; or else these disputes as to annual offices cannot be decided within the year, and therefore relief cannot be given. This court is not committed by former decisions: the point is still open. The cases in *Pennsylvania* have passed *sub silentio*: several of them relate to offices of a public kind; such as county treasurer, inspectors of prisons, county commissioners, and collectors of taxes. In *Commonwealth v. Murray*, 11 *Serg. & Rawle*, 73, the court evince a strong leaning against this remedy, in cases like the present.

Arguments for the relators. A *quo warranto* lies wherever a franchise is usurped against the king's prerogative. 2 *Inst.* 282. 9 *Co.* 28, a. *Yelv.* 191. *Finch*, 164, 3 *Bl. Com.* 262. Now, a franchise is defined to be a royal privilege in the hands of a subject. *Finch*, 164, 3 *Bl. Com.* 262, and a privilege of exercising a corporate trust comes within the principle. Accordingly, the court has exercised the power now asked for. They did so, in the case of the *German Lutheran Church, Commonwealth v. Woelper and*

(The Commonwealth v. Arrison and others.)

others, 3 Serg. & Rawle, 29, where judgment of *ouster* was rendered upon an information against persons exercising the office of churchwardens and vestrymen after a trial: and a fine of six shillings and eight pence was imposed without costs. *Ib.* 52. In *Commonwealth v. Cain and others*, 5 Serg. & Rawle, 530, an information against the defendants, as vestrymen of a church, was refused on the merits, and there was no question made about the propriety of granting the information, if it had been a proper case for it. In the case of *Commonwealth v. Cain and others*, 11 Serg. & Rawle, 73, the court for the first time express doubts concerning the remedy by information; but that was the case of a minister, and it was refused on a ground that was decisive against the relators there, namely, that they did not claim under the charter by which the defendant claimed. There are many previous instances of the application of this remedy by our Supreme court; such as against the treasurer of *Cumberland* county, in 1799, where it was said by SHIPPEN, J., to be the first application of the kind. *Commonwealth v. Wray*, 1 Dall. 490: against the defendant for exercising the office of Recorder of *Philadelphia*, which was refused on the merits. *Commonwealth v. Dallas*, 4 Dall. 229: against the inspectors of the prison of *Philadelphia*. *Commonwealth v. Douglass*, 4 Binn. 117: and again, the case of an information granted against a collector of taxes, an office of a subordinate grade and limited sphere. *Commonwealth v. Browne*, 1 Serg. Rawle, 382. In *Commonwealth v. Union Insurance Company of Newburyport*, 5 Mass. Rep. 230, Chief Justice PARSONS says, "informations of this kind are properly grantable for the purpose of inquiring into the election or admission of an officer, or member of a corporation, when moved by any person interested in, or injured by such election or admission." 3 Mass. Rep. 285, recognises the same principle. In *England*, this mode of proceeding has not been confined to the limits supposed. In *Rex v. Nicholson*, 1 Str. 299, an information was granted against persons who acted as trustees under an act of parliament for enlarging and regulating the port of *Whitehaven*: and it is said, that an information is always granted where a new jurisdiction or public trust is executed without authority; and various cases are given in *Kyd on Corp.* 395, 417, 418, 419, 421. In the present case there is no adequate remedy, but by information: many acts may be done by officers *de facto*, if suffered to continue, which cannot be avoided. The money received by them from the pews cannot be recovered back by an action. The public is greatly concerned in these corporations: they are numerous, and large and valuable interests of every description are involved in them. Suppose individuals illegally chosen take possession of the funds of a bank, the mischief they may do is immense, if there is no summary remedy for their removal. This court will not be deterred by the inconvenience of taking this jurisdiction, arising

(Commonwealth v. Arrison and others.)

from multiplicity of business and the difficulty of the question, since great good results from the exercise of this power. We have not had altogether a dozen cases of informations of this kind in fifty years. No distinction can be drawn between public and private corporations; or, rather, all are public, since they are emanations from the supreme power of the community, and are all established and guarded by a public law.

The opinion of the court was delivered by

TILGHMAN, C. J. A rule was laid on the defendants, to show cause why an information in nature of a writ of *quo warranto* should not be filed against them, for exercising the office of "Trustees of the Ninth Presbyterian Church in *Philadelphia*."

Before entering into the merits of the case, the counsel for the defendants made a preliminary point, viz. that the office exercised by the defendants was a mere private matter, in which the public had no concern, and therefore not the subject of an information. This point was fully and well argued, and the court has been furnished with all the learning to be found in the books on the subject. The statute of 9 *Ann. ch. 20*, not having been extended to *Pennsylvania*, the court must derive its power from the common law. *Bull. N. P. 211*. That, however, is of little importance, as the better opinion is, that the statute gave no new jurisdiction, but was made for the purpose of regulating informations, and making the remedy more effectual, easy, cheap, and expeditious, in cases of persons acting as corporation officers. An information is said to be grantable, only where the ancient writ of *quo warranto* would lie, and that writ, according to the argument of the defendants, was confined to cases where there was a usurpation of the king's prerogative, or of one of his franchises, or a misuser or nonuser of some right or privilege granted by the crown. A franchise is a word of extensive signification. It is defined by *Finch*, whom all subsequent writers have followed, to be "*a royal privilege in the hands of a subject*." *Finch*, 164. Franchises are divers, says *Finch*, and almost infinite. Of such sort are the liberty of holding a court of one's own; the right of warren in another's land; the right of holding markets, fairs, and taking toll, &c. &c. The commonwealth stands in the place of the king, and has succeeded to all the prerogatives and franchises proper for a republican government, and those only; for many branches of the royal prerogative would be altogether improper in this country. Informations have been granted in *England*, in almost all cases where the public were interested, in some of which it would be difficult to show, that any prerogative or franchise of the king had been invaded. As, in the case of the mayor and common council of *Hertford*, who took upon them to make strangers free of the corporation, without being qualified according to the charter. The reason assigned by *Buller* for granting this in-

(The Commonwealth v. Arrison and others.)

formation, was, "because the injured freeman of the town had no other way of remedying themselves, or of trying the right." To be *free of a corporation*, was certainly no royal franchise; but perhaps, in a very large sense, it might be said that the king's prerogative was invaded, when his charter was violated, by admitting one as a freeman contrary to its provisions. If that principle be correct, it will have an important bearing on the case before the court. An information was granted against certain persons for acting as trustees under an act of parliament for enlarging and regulating the port of *Whitehaven*, 1 *Str.* 299. The granting permission to file informations of this kind, on the application of private persons, is matter of discretion, and the court will refuse it in cases of little import, or where the injury is of a private nature. It was refused in *Sir William Lowther's Case*, (2 *Lord Raym.* 1409, 2 *Kyd on Corporations*, 418,) "for setting up a free warren," on the ground that it was of a private nature, and therefore proper to be prosecuted only in the name of the attorney general, if the king should think fit. So, in the *King v. Hansell*, (9 *Geo. 2. Cas. temp. Hardw.* 247,) Lord HARDWICKE thus expresses himself: "The court, indeed, have themselves made this distinction, to grant informations for *public usurpations*; but if it is only of a *private franchise*, not concerning the public government, as a *fair*, &c., the court has sometimes refused them, and directed an application to the attorney general." It is observable, that Lord HARDWICKE does not here *deny* the *right* of the court to grant the information, but affirms it. Whether to grant, or refuse it, in case of a churchwarden, has been a vexatious question in *England*, but has been finally settled against granting it. I find no instance of an information in nature of a *quo warranto* in that country, except in a case of a usurpation of the king's prerogative, or of one of his franchises, or where the public, or at least a considerable number of people, were interested. Neither do I find any case in which it has been denied, that the court may, in its discretion, grant it, where an office is exercised in a corporation, contrary to the charter. In *England*, the number of corporations is very small indeed, compared with the *United States of America*. Consequently, the quantity of that kind of business which may be brought into our courts will be much greater than theirs. But that alone is not a sufficient reason for rejecting it. We are now to decide a general question on the *right* of the court; not on the expediency of exercising that right, either on the present, or any other case. Now, to establish it as a principle, that no information can be granted in cases of what the counsel call *private corporations*, might lead to very serious consequences. Perhaps it may be said, that banks, and turnpike, canal, and bridge companies, are of a *public* nature; but yet they have no concern with the government of the country, or the administration of justice. They are no far-

(The Commonwealth v. Arrison and others.)

ther public, than as they have to do with great numbers of people. But if numbers alone is the criterion, it will often be difficult to difficult to distinguish public from private corporations. Let us consider *churches*, for example. In some, the congregation is very numerous, in others very small. How is the court to make the line of distinction. If you say that court has the right in both cases, to grant or deny the information, according to its opinion of the expediency, there is no difficulty as to the right. But if it be alleged that there is a *right* in one case, and not the other, the difficulty will be extreme. I strongly incline to the opinion, that in all cases where a *charter* exists, and a question arises concerning the exercise of an office *claimed under that charter*, the court may, in its discretion, grant leave to file an information. Because, in all such cases, although it cannot be strictly said that any prerogative or franchise of the commonwealth has been usurped, yet, what is much the same thing, the privilege granted by the commonwealth has been abused. The party against whom the information is prayed, has no claim but from the grant of the commonwealth, and an unfounded claim is a usurpation, under pretence of a charter, of a right never granted. Having given my sentiments of the principle on which the present question turns, I will now consider the authorities in our own courts, which I think bear me out in the view I have taken of it. The first instance of an information in nature of a *quo warranto*, was in the year 1799, in the case of *The Commonwealth v. Wray*, 3 *Dall.* 390. The defendant exercised the office of treasurer of *Cumberland* county. The next reported case, is *The Commonwealth v. Douglass and others*, inspectors of the prison of *Philadelphia*, in the year 1803. The information was granted. 1 *Binn.* 77. In the year 1811, an information was asked and refused, in *The Commonwealth v. Smith*, clerk of the market of *Pittsburg*, 4 *Binn.* 117. The sole reason of the refusal was, that the Supreme Court had no right to try an issue at *Pittsburgh*, otherwise the information would have been granted. In 1815 an information was granted against *Liberty Browne*, who exercised the office of collector of taxes in *Philadelphia*. *The Commonwealth v. Woelper, &c.* is very much in point. There, not only was an information granted against the defendants, who acted as vestrymen of the *German Lutheran Church of Zion*, but on a trial they were convicted, and judgment of ouster given against them. If it be said, that the defendants made no objection to the power of the court, it is true; but yet it is of some weight, that the able counsel for the defendants, in a case much litigated, either did not think of the objection, or supposed it was not tenable. Next came the case of *The Commonwealth v. Cain and others*, vestrymen of *St. Thomas's African Episcopal Church of Philadelphia*, in the year 1820, 5 *Serg. & Rawle*, 510: the information was granted without objection. Last of all was *The Commonwealth v. Mur-*

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ray, who claimed to be the minister of the *Wesley Church*, (in 1824, 11 *Serg. & Rawle*, 73.) There, the point now before us was directly in question for the *first time*. The information was refused, because the party who moved for it claimed in opposition to the charter under which the defendant held. The court declined an opinion on the *right* to grant the information, but spoke of it as undecided, and worthy of consideration. That is the only case in which there has been any suggestion of doubt. In all the other, the right was taken for granted. From the cases cited in this argument, from the *Massachusetts* and *New York* reports, I conclude that the judges of these states are in favour of the right to grant the information. I am of opinion, that this court has the right of granting, and at the same time the right of refusing, according to circumstances.

[PHILADELPHIA, JANUARY 8, 1827.]

GRACE *against* ALTEMUS.

IN ERROR.

Plaintiff obtained judgment before a justice of the peace, on the 31st of *January*, 1822, for thirty dollars and costs. Defendant appealed, and gave evidence not given before the justice, and verdict and judgment were rendered for the plaintiff for thirteen dollars, on the third of *May*, 1823. *Held*, that the plaintiff was entitled to his costs before the justice, each party paying his own costs on the appeal, notwithstanding the 9th section of the act of the 28th of *March*, 1810, that section being repealed on the 1st of *April*, 1823, before the verdict.

WRIT of error to the Court of Common Pleas of *Northampton* county.

Scott, for the plaintiff in error.

Tilghman, contra.

The opinion of the court was delivered by

TILGHMAN, C. J. The plaintiff in error, who was also plaintiff below, commenced an action before a justice of the peace on the 24th of *January*, 1822, in which he obtained judgment against the defendant on the 31st day of the same month and year, for thirty dollars and costs. The defendant appealed to the Court of Common Pleas, where the cause was tried by a jury, and a verdict and judgment entered for the plaintiff for thirteen dollars, on the 2d of *May*, 1823. This judgment was entered *without costs*, the court being of opinion that the plaintiff was not entitled to any. It is conceded, that on the trial in the Court of Common Pleas, the defendant gave evidence which had not been given before the justice, and it is now agreed by the counsel on both sides, that

(Grace v. Altemus.)

under those circumstances, the plaintiff would, according to the decision in *Kimble v. Saunders*, 10 *Serg. & Rawle*, 193, have been entitled under the act of the 20th of *March*, 1810, to his costs before the justice, each party paying his own costs on the appeal. But the plaintiff contends, that by the act of the 28th of *March*, 1820, section 9, which was in force when he commenced his action before the justice, he was entitled to the costs in the Common Pleas, as well as before the justice, because he obtained a final judgment against the defendant; although, at the time of entering the final judgment, the 9th section of the act of the 28th of *March*, 1820, was repealed, by the act of the 1st of *April*, 1823, section 4. In support of this claim, the plaintiff argues, that the repealing act of the 1st of *April*, 1823, does not affect suits which were depending at the time of its passage, because the plaintiff in such cases had a *vested right* to costs, according to the law at the time of the commencement of the suit. But the repealing act makes no exception; so that at the time when the final judgment in this case was entered, there was no law in existence by which the plaintiff could be entitled to the costs which accrued on the appeal. And, as to a *vested right* to costs, the plaintiff had no such thing at the commencement of his action, because it was uncertain then whether he would recover any costs. Judgment might have gone in favour of the defendant, and then the plaintiff would have had to pay costs. I am therefore of opinion, that the costs must be governed by the act of the 20th of *March*, 1810. Consequently, the plaintiff was entitled to his costs before the justice, and each party pays his own costs on the appeal. The judgment, therefore is to be reversed, so far as respects the costs before the justice, which the plaintiff is to recover. As to all the rest, the judgment is to be affirmed.

Judgment affirmed.

[PHILADELPHIA, JANUARY 17, 1827.]

LYSLE and another *against* WILLIAMS, Administratrix of WILLIAMS.

The objection, that a bond and warrant were usurious, cannot be taken to a *scire facias* on the judgment confessed on the warrant.

Under an agreement between mortgagor and mortgagee, that the latter shall go into possession and receive the rents, and apply them to the payment of the debt, he is entitled to an allowance for payment of taxes, ground rent, and necessary repairs.

A bond and warrant were dated the 22d of July, 1818, for the payment of a sum of money in five years from the date: *held*, that a *scire facias* on the judgment confessed on the warrant, issued on the 22d of July, 1823, was not too soon.

The distinction is between the legal construction of the words, from the date, when used by way of computation, and when used by way of passing an interest.

THIS case was tried at *Nisi Prius*, in April, in 1826, before DUNCAN, J., and a verdict was given for the plaintiff, subject to the opinion of the court.

It was now argued by *Tod*, for the plaintiff, and *Phillips*, for the defendants.

HUSTON, J., gave no opinion, not having heard the argument.

The opinion of the court was delivered by

ROGERS, J. The 22d of July, 1818, *Robert Williams* executed a bond to *Lysle* and *Newman*, in the penalty of six thousand dollars, conditioned to pay three thousand in *five years from the date*, with lawful interest half yearly and every year. On the same day, judgment was entered by warrant of attorney. A mortgage on a house and lot in Sixth Street accompanied the bond. Possession of the house and lot mortgaged was delivered to *Lysle* and *Newman*, to receive the rents and profits and apply them to the payment of the bond. On the 22d of July, 1823, a *scire facias* was issued on the judgment against *Amelia Williams*, administratrix of *Robert Williams*, to which she pleads payment, &c.

On the trial of the cause, the defendants offered to prove, in substance, that this was a usurious transaction; that the sum advanced by *Lysle* and *Newman* was two thousand dollars, instead of three thousand; and that the rents and profits received by *Lysle* and *Newman* were more than sufficient to keep down the interest on two thousand dollars. This testimony was overruled, and the point was reserved for the decision of this court. It has been properly conceded by the counsel of the defendant, that the testimony was correctly overruled; for, however proper the defence would have been to the original contract, yet the defendant being concluded by the judgment, it will not avail her as a defence to the *scire facias*. Had the presiding judge been requested to dismiss the jury, he, in the exercise of a sound dis-

(Lysle and another v. Williams, Administratrix of Williams.)

cretion, would have had the power, and in this case perhaps would have done so, and directed an issue to try the facts alleged in the offer of the defendant. Instead of doing this, the point is merely reserved, and it comes before this court as a matter of law, which presents no difficulty whatever.

By the record, it appears that the jury found for the plaintiff *de terris*, subject to the opinion of the court, whether the *scire facias* issued before any thing was due, and subject to the adjustment of the interest, as per memorandum filed on the 17th of *April*, 1826. From this, it would appear that these were the only matters which the court are called on to decide.

The auditor appointed by the court has made his report, in which there does not appear to be any error. It has been admitted, that the sums charged for repairs, ground rent, taxes, &c. have been paid by *Lysle* and *Newman*, and unless it appears, which it does not, that those repairs were unnecessary, they were entitled to allowance for them, on a fair construction of the agreement between the parties. It was the rents, clear of the necessary expenditure, which was to be applied to the extinguishment of the interest and principal of the bond.

The only question, which remains to be considered under the finding of the jury, is, whether the *scire facias* issued too soon. It will be recollected, that the bond was dated the 22d of *July*, 1818, payable in *five years from the date*, and that the *scire facias* was issued the the 22d of *July*, 1823. The determination of this question will depend upon the legal import of the words *from the date*, applied to a bond, or, in other words, whether the 22d of *July*, 1818, be *inclusive* or *exclusive*.

From a careful review of all the cases, this principle, which has an immediate application to this question, may be fairly extracted: That when the words, *from the date*, are made use of to denote the *terminus a quo*, an immediate interest is to pass, the date of the instrument is *inclusive*. And the reason of the rule is, that when words of an equivocal meaning are made use of, and there is no index, from which the intention of the party who used them may be gathered, the construction shall be made most advantageous for him, in whose favour the instrument is made. The distinction is between the legal construction of the words, *from the date*, when used by way of *computation*, and when used by way of *passing an interest*. Upon the execution of the bond, on the 22d of *July*, 1818, an immediate interest passed to *Lysle* and *Newman*; and, as in law there are no fractions of a day, they are entitled to interest for the whole of the 22d of *July*, 1818. It follows that the five years had expired on the 22d of *July*, 1823, and that the *scire facias* was properly issued.

The great contest in *England* appears to me to have been with respect to the legal intent of the words, *from the day of the date*. Lord MANSFIELD, in the celebrated case of *Pugh and Wife v.*

(Lysle and another v. Williams, Administratrix of Williams.)

Duke of Leeds, from an elaborate review of all the cases, has deduced this principle,—that the word *from*, may mean either *inclusive* or *exclusive*, according to the context and subject matter; and that the court will construe it so as to effectuate the deeds of the parties, and not to destroy them. In the course of his argument, he has considered *from* as the operative word, and has endeavoured to show that *from the date*, and *from the day of the date*, mean one and the same thing. These positions, *Powel*, in his *Treatise on Powers*, page 494, has combatted with great force and ingenuity. I do not, however, consider that the principle which governs this case is denied by either. On the contrary, it is expressly recognised by both. When the point, which has governed the *English* jurists, comes directly before this court, it will then be in time to consider whether the distinctions contended for so strenuously by *Powel*, be not too refined, partaking too much of legal subtlety for the meridian of this country. In this state, the question is comparatively of but small importance, as there is but little danger of unsettling estates, determine it which way we may. In *England*, the difficulty has arisen in the construction of leases, made in pursuance of powers contained in marriage settlements, and in last wills and testaments, usually with intent of making provision for younger children. As, happily, we have no such class of cases, and are unshackled by authority, we shall be left free to adopt the construction which best comports with the common sense and understanding of mankind.

Judgment for the plaintiffs.

[PHILADELPHIA, JANUARY 17, 1827.]

MILLER, surviving Partner of VAN BEUREN, *against*
BARTLET and another.

IN ERROR.

Agreement between B. and H., that H. should give his attendance and services in the grocery store, then carried on by B., and for such services B. should pay H. a salary of one thousand dollars per annum, as well as to pay and allow him a commission of seven per cent. on the profits arising from goods sold, after deducting the said salary and rent of store, which agreement was carried into effect: *Held*, not to constitute H. a partner.

THE plaintiff in error, *John Miller*, who survived *Abraham Van Beuren*, late partners under the firm of *Miller and Van Beuren*, was also plaintiff below, and instituted this action in the District Court for the city and county of *Philadelphia*, against the defendants below and defendants in error, *John Bartlet* and *John Harding, jr.* It was tried by jury, on the general issue,

(Miller v. Bartlet and another.)

and a special verdict found, on which the court below rendered judgment for the defendants, and the judgment and proceedings were removed to this court by writ of error.

The special verdict found that *John Bartlet* made four promissory notes, which were regularly entered in his books of trade, in favour of the plaintiff, dated in *October, November, and December, 1822*, which were due at the commencement of the suit, and remained unpaid, amounting to upwards of nine hundred dollars. By an agreement in writing between *Bartlet* and *Harding*, in *July, 1821*, it was stipulated that *Harding* agreed on his part to give his services and attendance in conducting the grocery business, then carried on by *Bartlet*, at No. 17, South Water Street, and for his services so rendered, *Bartlet* agreed to pay *Harding* a salary of one thousand dollars per year, as well as to pay and allow him a commission of seven per cent. on the profits arising from goods sold, &c. after deducting therefrom the above sum of one thousand dollars and rent of store; and, by entries in the books of *Bartlet*, in the handwriting of *Harding*, it appeared that he received credit accordingly, for his said salary and commission. *Bartlet* became insolvent, and the object of this suit was to make *Harding* liable as a partner.

Peters, for the plaintiff in error. The single point is, whether one who receives a salary as clerk, and also a commission of seven per cent. on the profits of the partnership, be a partner. There was no limitation to the amount of profits on which the defendant was to receive a commission. The responsibility of a secret partner arises from his receiving a share of the profits, no matter how great or how small the share. He who partakes of profits is a partner, because he takes part of the fund on which the creditors rely for payment. *Coope v. Eyre*, 1 *Hen. Black.* 37. 1 *Mont. Part.* 5, 6. *Gow on Part.* 14, 15, 16, 18, 19. *Grace v. Smith*, 2 *W. Black.* 998. *Wagh v. Carver*, 2 *H. Black.* 243. 17 *Vez.* 40. *Wat. Part.* 11. *Hesketh v. Blanchard*, 5 *East*, 143. 17 *Vez.* 404.

Lowber and Binney, contra. It is necessary that one should have a distinct interest in the profits, in order to make him a partner. He must have a property in certain proportions of the profits as such, not merely a right to look to the profits for payment of a debt. The owner of a share of profits may take the share specifically from the partnership fund, or he may have his action of account render. *Harding* could not support account render for his commission on the profits. There may be various other kinds of interests which do not make one a partner. Suppose a creditor attaches the interest of one of the partners, or that he takes it in execution: *Harding* was not interested as owner, but had a right to a compensation in nature of wages payable out of profits. It is certain no partnership was intended by the parties. The principle is established by various authorities. *Gow*, 19, 20. *Ex parte Rowlandson*, 1

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Rose, 89. *Ex parte Watson*, 19 *Vez.* 461. 5 *Taunt.* 74. *Benjamin v. Porteus*, 2 *H. Black.* 490. *Wilkinson v. Frazer*, 4 *Esp. N. P. C.* 182. *Dry v. Boswell*, 1 *Camp.* 329. *Wish v. Small*, 1 *Camp.* 331. *Ex parte Langden*, 18 *Vez.* 301. *Ex parte Gellier*, 1 *Rose*, 297. *Cheap v. Crammond*, 6 *Serg. & Lowb. Ab.* 556. *Murray v. Whitney*, 10 *Johns.* 226. *Rice v. Austin*, 17 *Mass.* 197.

Reply. All who share profits are partners as to creditors, whatever may be their agreement among themselves. As to commissions on profits, the distinction is this: a commission on profits to a certain amount, is not a partnership; but a commission on the whole profits, whatever they may be, is a partnership. And no case can be produced showing that a commission on the whole profits is not a partnership.

ROGERS, J., and HUSTON, J., not having heard the argument, took no part in the judgment.

The opinion of the court was delivered by

GIBSON, J. Where the acts of the parties bring them within any rule of law by which the relation of partnership is produced, it is of no importance that a contract of partnership was not intended. The rule which declares that all who participate in the profits shall be held liable as partners, is founded in public policy, and it is particularly strange that it should have been relaxed in cases like the present. How a commission on profits can be distinguished from an interest in the profits, as such, I am at a loss to comprehend. The profits cannot be ascertained before the partnership account is settled, and then a party, under a claim to commission, is entitled to what? To a compensation equal in amount to so many hundredths of the sum of the profits. He is said not to have a specific interest in the profits as such. He has indeed no lien or specific demand on a particular fund as a *corpus*; but neither has a partner who is admitted to be so; profits being an incorporeal essence, and without specific existence before they are received and enjoyed. It is impossible to discover any difference but what is found in the terms, between a dividend and a commission: yet this difference, flimsy as it is, seems to be firmly established. In *Ex parte Hamper*, 17 *Ves.* 404, Lord ELDON admits a distinction, while he regrets it; and the cases cited on the part of the defendant, establish its existence in the *English* courts beyond the possibility of contradiction. Ought we then to follow the *English* courts, or, the point being of the first impression here, establish a rule for ourselves, on the foundation of what we may justly suppose to be reason and common sense? In an ordinary case, we ought not to hesitate; but although the law of merchants be usually considered as a part of the common law, and this notion receive countenance from the fact that certain commercial usages prevail in particular countries, yet Mr. *Marshal* is of opinion (*Treatise*

(Miller v. Bartlet and another.)

on *Ins.* 18,) that not being founded in the institutions of any particular country, but in general convenience, as respects the dealings of merchants with each other in all countries, it may be considered as a branch of public law. In *Luke v. Lyde*, 2 Burr. 887, Lord MANSFIELD declares that the maritime law is of no particular country; but that it is the general law of nations; and this opinion is fortified by writers of great authority. 4 *Com. Dig.* 67. *Emerigon*, 21. If so, we are bound by the decisions of foreign courts on commercial questions, as firmly as we are by our own. It seems, then, that however we may be dissatisfied with the conclusion at which the *English* courts have arrived, yet the question proposed to the court below, is no longer open to debate; and we are satisfied that there is no error in the record.

Judgment affirmed.

[PHILADELPHIA, JANUARY, 17, 1827.]

GRANT and another *against* The MECHANICS' BANK of Philadelphia.

Under the act of the 21st of *March*, 1814, regulating banks, (section 7, article 11,) the bank was justifiable in refusing to permit a stockholder to transfer his stock, who was the drawer of a note discounted at the bank, but not payable when the transfer was requested, he and the indorser having then become insolvent. The meaning of the word, "*indebted*," in the 11th article.

THIS was an action on the case, brought by *Grant* and *Taylor*, assignees of *Thomas* and *Benjamin Williams*, against the Mechanics' Bank of *Philadelphia*, for refusing to permit the said *T.* and *B. Williams* to make a transfer to the plaintiffs of thirty shares in the said bank. The deed of assignment under which the plaintiffs claimed, was dated the third of *August*, 1822. On the 7th of *August*, the plaintiffs called at the bank, in company with Messrs. *Williams*, and asked permission to have a transfer made on the books of the bank, agreeably to the provisions of the act of assembly of the 21st of *March*, 1814, by which the company was incorporated. The bank refused permission, unless payment was made, or satisfactory security given for the amount of several promissory notes drawn by *T.* and *B. Williams*, and indorsed by *John Pray*, which had been discounted by the said bank, but had not fallen due at the time the transfer was demanded. It was understood, that at that time both the drawer and indorser of the notes were insolvent. This action was brought to recover damages, for the refusal to permit the transfer.

J. R. Ingersoll, for the plaintiff. The question is, whether the notes, with evidence that both drawer and indorser were insol-

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vent, justified the bank in refusing the transfer; and it depends on the eleventh article, contained in the seventh section of the act of the 21st of *March*, 1814, under which this bank was incorporated, which provides that "no stockholder *indebted* to the institution shall be authorized to make a transfer or receive a dividend, till *such debt* shall have been discharged, or security to the satisfaction of the directors given for the same." These notes were not due, and, in the meaning of the act, a person was not *indebted* to the bank until his note was due. Until the statute 7 *Geo.* 1, no creditor whose debt was not due could prove under a commission of bankruptcy, or claim a dividend. *Blackstone* defines a debt to be a contract, by which a sum of money is due. The act renewing this and other charters, passed the 25th of *March*, 1824, restricts the power of the bank to withhold a transfer to the case of a person indebted to the bank for a debt actually due and unpaid. This may be considered a legislative exposition of the former act. The construction contended for by the defendant is contrary to the custom and usage of banks. It was proved, on the trial, that it was customary for this bank to make loans on actual security of stock expressly pledged, and also that it was the usage to permit transfers and pay dividends where the debt was not actually due. He cited, 2 *P. Wms.* 209. 4 *Burr.* 2220. 8 *Term Rep.* 199.

Broome and *Binney*, contra. The question arises properly on the construction of the eleventh article of the act of the 21st of *March*, 1814. The plaintiffs have no equity to induce the court to strain the law. Indebted means a note discounted, but not due. *Johnson's Dictionary* defines indebted, "having incurred a debt." All money owing, is a debt in the language of the acts of assembly. Article 6th speaks of the total amount of debts of the bank; and section 15th, of a yearly abstract of debts and credits of the bank, to be transmitted to the auditor general. By section 16, the legislature appoints a committee to ascertain the debts and credits of the bank. Surely all debts are included in this phraseology, though not actually payable. So, in the Insolvent Debtors' Act, of *March* 26th, 1814, *Purd. Dig.* 361, where the debtor is required to exhibit an account of his debts: and the court may make an order to discharge him from all debts contracted and due. This has been construed to include debts not then payable. 3 *Serg. & Rawle*, 559. The language of the Intestate Act must receive the same construction. The act of *March*, 1824, was an alteration, not an explanation of the act of 1814. It was a new law, conferring a new charter. No usage has been proved, bearing on the case. The witness knew no instance where a stockholder had transferred after he had failed. The act, therefore, must be construed according to its words, under which we contend that the drawer of a note is indebted to the holder the moment he delivers the note. The clause was meant to benefit the

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Bank; but the benefit is little, if the bank may not stop a transfer, on account of a note discounted, but not yet payable. One bound in a bond to pay, when *J. S.* comes from beyond sea: it is a debt presently. *Neal v. Sheffield, Cro. Jac.* 254. A bond payable *in futuro*, is released by a release of all debts. *Cro. Jac.* 300. *Yelv.* 215, *S. C.* The drawer of a foreign bill is indebted from the date of the bill. 3 *Wils.* 17. The statute 7 *Geo.* 1, we take to be declaratory. It recites, that it hath been a question, and then goes on to enact. Not only in legal strictness, but in popular use one is indebted before the time of payment. All our numerous assignments, in trust for the use of creditors, use it in this sense. There is a marked distinction between the words of the act in question, and those of the act incorporating the *Philadelphia* Bank, on this subject. In the latter, which was passed the 5th of *March*, 1804, all debts due to the bank from a stockholder, days of grace being past, must be satisfied before transfer.

Chauncey, in reply. When the act of *March*, 1814, was passed, it was not considered that a stockholder pledged his stock by obtaining discount. By section 9, these banks are required to make loans to the amount of one fifth of the capital paid in to farmers, mechanics, and manufacturers for one year, taking security by bond, mortgage, or otherwise. The inconvenience would be great, if a stockholder who has given a note to a third person, which is by him discounted at the bank, shall be cut off from his dividends and right of transfer. *Indebted* is, it is true, a word of large import, but may, if the subject requires it, be properly restricted to a debt actually due: on the contrary, if the subject requires it, it may be include debts contracted but not actually due. Whatever may have been the case in the country, the city banks always took an express lien on stock when they meant to rely on it as security.

The opinion of the court was delivered by

TILGHMAN, C. J. The case depends on the eleventh fundamental article in the seventh section of the act of the 21st of *March*, 1814, entitled "*an act regulating banks.*" This article, so far as concerns the present question, is in the words following: "The stock of each of the said companies shall be assignable and transferable on the books of the company only, and in such manner as the by-laws shall ordain, but no stockholder *indebted to the institution*, shall be authorized to make a transfer, or receive a dividend, till such *such debt* shall have been discharged, or security, to the satisfaction of the directors, given for the same."

It will be recollected that this act brought into existence forty banks, scattered through the state, and most of them out of the city of *Philadelphia*; so that, in a doubtful case, it would be wrong to give it a construction different from the common import of the words, in order to make its provisions conformable to any supposed custom of doing business in the city. Indeed, no custom

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of the Mechanics' Bank, which can affect the present question, was proved, so that I throw out of consideration all arguments drawn from that source. Where words have acquired a *technical* meaning, it is to be presumed that they are used in that sense, unless there be something in the statute which shows a contrary intent; for wherever the intent of the legislature plainly appears, it governs the construction. But where words are not technical, their meaning is, in general, best ascertained by common parlances. Laws are made for the people, and should be expressed in language which they understand. Now the word *indebted* has not acquired a technical signification, and, in common understanding, means a sum of money which one has contracted to pay to another, whether the day of payment be come or not. Even in *law* language we speak of *debitum in presenti, solvendum in futuro*,—a present debt, to be paid in a future time. So, in *act of assembly language*, a debt signifies money payable at a future time. For example, the Intestate Law of the 19th of *April*, 1794, section 14, enacts, that "*all debts owing by any person within this state at the time of his decease*," shall be paid by his executor or administrator in a certain *order* prescribed by the said act. No man ever doubted that this *order* extended to all money which the intestate was bound to pay, whether *actually due* at the time of his death or not. Suppose one who had drawn notes and circulated them, to a large amount, should make a voluntary transfer of his property before they fell due, could it be said that this was fair, because, at the time of transfer, he was *not indebted* on these notes? But let us consider whether there is any thing in the general policy of the act of *March*, 1814, which should divest this word *indebted*, of its usual meaning. It is said by the counsel for the plaintiffs, that it would be extremely inconvenient, and hard, on stockholders, if they were to lose the right of making transfers, or receiving dividends, merely because they happened to draw or indorse a note, which was discounted in a bank, perhaps without their knowledge. That an inconvenience might sometimes happen in this way, is true; but it is believed not often, because the directors would not be apt to refuse permission to transfer, or withhold dividends in stock, unless there was danger of loss; besides, the stockholders derived no small advantage from the facility with which they obtained discounts on the faith of a lien on their stock. The question is, however, not whether stockholders might be put to inconvenience, but what was the intent of the law. Now, no doubt, this restraint on the transfer of stock was intended for the benefit of the bank. But of what benefit would it be, if the stockholder had the unrestrained right of transfer, at any time before his note fell due? The time of making this loan, is that at which the directors must look out for security. If the stock was pledged by law, they might be easy as to other security. But if, trusting to this pledge, they discounted a stock-

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holder's note, who had the right to withdraw his stock at pleasure, then the security in fact amounted to nothing. To be sure, if it were clearly ascertained, that by *indebted* the law meant nothing but a debt *actually due*, the bank directors would have no right to complain; because they would know that the stock was no security, and therefore they must look well to the character and property, (other than stock,) of the drawers and indorsers, before a note was discounted, or demand an actual pledge of the stock. And indeed this is the actual situation of the Mechanics' Bank and many others incorporated by the same original act of *March, 1814*, and rechartered by the act of the 25th of *March, 1824*, entitled "*An Act to recharter certain Banks.*" In this last act, the words of the eleventh fundamental article are strikingly different from those of the same article in the act of 1814. Instead of saying, "no stockholder *indebted* to the institution," the expressions are, "no stockholder indebted to the bank, *for a debt actually due and unpaid*, shall be authorized to make a transfer," &c. This, however, was not intended as an *explanation* of the first law, but an *alteration*, in consequence of a change of policy. What occasioned this change of policy, it is unnecessary to inquire. This right of lien in the bank was brought before the court, in the case of *Rogers and others v. The Huntingdon Bank*, at *Chambersburg*, *October Term, 1824*, which will be reported in 12 *Serg. & Rawle*, now in the press.* I will not undertake to be positive that the very point now in question was decided, but I am satisfied that it was in the mind of the court, and their opinion was in favour of the lien. In the present case, therefore, the plaintiffs had no right to a transfer, the notes of Messrs. *Williams*, (the owners of the stock,) which had been discounted by the bank, not having been paid, or security given for payment, and consequently this action is not maintainable.

There was a second count in the declaration, for money had and received, &c., intended for the recovery of the dividends on the stock which fell due after the 7th of *August, 1822*. As the plaintiffs' claim of dividends stands precisely on the same ground as their right to receive a transfer, I have thought it unnecessary to say any thing particular on that head.

Judgment for the defendants.

* Since reported.

[PHILADELPHIA, JANUARY 17, 1827.]

TRAIN, Executor of NUNEZ, *against* FISHER.

IN ERROR.

Testator directs his executors to sell his real and personal estate, and that the interest of one half of the proceeds shall yearly and every year be paid by his executors to H. N., her heirs and assigns for ever, during her natural life; but, in default of issue of the said H. N., the said moiety of the principal and interest shall descend to the next of kin, or heirs at common law, and their heirs and assigns for ever. *Held*, that H. N. took the moiety absolutely.

THIS case was tried before GIBSON, J., at *Nisi Prius*, in *March* last, and a verdict was found in favour of the plaintiff for the sum of two thousand seven hundred and fifty-two dollars, and sixty-two cents, subject to the opinion of the court, whether the plaintiff was entitled to recover.

The suit was by *Mary Train*, executrix of *Hannah Nunez*, against *S. R. Fisher*.

On the 27th of *March*, 1760, *Jacob Phillips* made his last will, containing the following clauses:

Thirdly. "My will and pleasure is, and I do hereby empower and authorize my executor hereafter named, to sell all the residue of my estate, both real and personal, and give full powers, either by deeds of conveyance, or bills of sale, to settle and secure the right and property to the purchaser.

Fourthly. "My will and pleasure is, that the money arising from the aforesaid sale, and all debts due to me on bond or otherwise, that shall be recovered or received by my executor, be by him put to interest within some convenient time after my decease.

Fifthly. "My further will and pleasure is, that the money arising from the sale aforesaid, and debts as aforesaid, that the one moiety of the interest of the same yearly and every year arising, be paid by my executor to my well beloved wife aforesaid, and after her decease that the moiety of the principal money and interest, shall descend to the next of kin or heirs of common law, and to their heirs and assigns for ever.

Sixthly. "My will and pleasure is, that the other moiety or half part of the money arising from the said sale, my meaning and will is, that the interest of the same shall, yearly and every year, be paid by my executors unto *Hannah Nunez*, her heirs and assigns, during her natural life. But, in default of issue of the said *Hannah Nunez*, the said moiety of the principal money and interest shall descend to the next of kin or heirs at common law, and to their heirs and assigns for ever."

The testator appointed *Alexander Kollock*, the elder, his executor. On the 31st of *May*, 1794, *John Swift* executed and de-

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livered to *Philip Kollock* and *Hester Moore*, executors of *Jacob Kollock*, who was executor of *Jacob Phillips*, a bond in the penal sum of one thousand four hundred and twenty pounds, thirteen shillings and seven and a half pence, with condition to pay the obligees seven hundred and ten pounds six shillings and nine and three quarter pence, on or before the 31st of *May*, 1795, together with lawful interest from the date. The said interest being for the proper use of the above named *Hannah Nunez*, during her natural life, and the said principal sum to descend, according to the directions of the will of the said *Jacob Phillips*, deceased. On the 7th of *August*, 1798, the said bond was delivered by the said *Philip Kollock* and *Hester Moore* to *S. R. Fisher* and *Miers Fisher*, with a power of attorney to collect the principal after the death of *Hannah Nunez*, and to apply it to a debt due by them personally to *S. R.* and *M. Fisher*.

Hannah Nunez died in the month of *May*, 1819, having made her last will and testament, by which she devised and bequeathed all her estate to *Mary Train*, the plaintiff, and appointed her executrix.

On the 8th of *June*, 1822, the defendant, *Samuel R. Fisher*, recovered from *Samuel Swift*, executor of *John Swift*, the obligor above named, one thousand eight hundred and ninety-four dollars, and twenty-four cents, the principal of the said bond, and three hundred and forty-nine dollars, and fifty cents, interest thereon, from the 12th of *May*, 1819, the day of *Hannah Nunez's* death.

This action was brought to recover the above sums, and interest, as having been the property of *Hannah Nunez*, and as having passed to her executrix.

Binney, for the plaintiff, contended that the plaintiff was entitled to recover under the will of *Hannah Nunez*, who took an absolute estate in the money, under the bequest by *Jacob Phillips*, and it made no difference that the interest only was bequeathed. *Fearne, Cont. Rem.* 478, 461, 480, 486, 459, 464. 8 *Vin.* 239, 451. *Burford v. Lee*, 2 *Freem.* 210. *Anon.* 2 *Freem.* 287. *Green v. Rod, Fitz.* 68. *Bacon v. Neff, Moore*, 464. *Attorney General v. Sutton*, 1 *P. Wms.* 758. *Butterfield v. Butterfield*, 1 *Vez.* 133, 154. *Daw v. Pitt, Fearne*, 464. *Chandless v. Price, Fearne*, 457. Then the defendant received the money, not as agent, but as principal; and as such claiming it, though he had notice of its nature, and that it was a trust in the executors. Money may be followed into the hands of such a receiver as trustee. *Paget v. Hopkins, Prec. in Ch.* 431, note. *Upwell v. Halsey*, 1 *P. Wms.* 651. *Mansell v. Mansell, Cas. temp. Talb.* 252. *Adair v. Shaw*, 1 *Sch. & Lef.* 262. *Ridgely v. Carey*, 4 *Harris & M'Hen.* 167. *Murray v. Barron*, 1 *Johns. Ch.* 566. *Sheperd v. M'Ivers*, 4 *Johns. Ch.* 136. *Crane v. Drake*, 2 *Vern.* 616. *Hodges v. Waddington*, 2 *Vent.* 360. 2 *Madd. Ch.* 125.

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Broome, contra, argued that *Hannah Nunez* was to have the interest only during life; and the construction of the will was, if she died without leaving issue, and the bequest over was good. *Hauer v. Sheetz*, 3 Yeates, 224. 4 Serg. & Rawle, 385. *Forth v. Chapman*, 1 P. Wms. 666. 3 Atk. 328. *Atkinson v. Hutchinson*, 3 P. Wms. 258. *Hoge v. Hoge*, 1 Serg. & Rawle, 152. *Clark v. Baker*, 3 Serg. & Rawle, 478. *Huwley v. Northampton*, 8 Mass. Rep. 38. *Keeley v. Fowler*, 2 Fearn, 245. *Clifton v. Haig*, 4 Dessaus. Ch. Rep. 330. *Doe v. Laning*, 2 Burr. 1106. *Smith v. Clever*, 2 Vern. 38, 60. *Sheffield v. Orrery*, 3 Atk. 288. *Robinson v. Robinson*, 1 Burr. 44. *Jackson v. Billinger*, 2 Ves. 501. 2 Atk. 648. *Pinbury v. Elkin*, 1 P. Wms. 564. *Pladel v. Pladel*, Id. 748. *Sabberton v. Sabberton*, Cas. temp. Talb. 250. *King v. Melling*, 1 Vent. 230. *Lodington v. Kyme*, 1 Lord Raym. 203. *Clare v. Clare*, Cas. temp. Talb. 25. *Higgers v. Dowler*, 1 P. Wms. 99. He also contended, that the action was not maintainable. Although *S. and M. Fisher* received this money under a power of attorney, authorizing them, after the death of *Hannah Nunez*, to apply it to the payment of a debt due from the executors to the defendant, yet *non constat* that it has been so applied. Then, if the money may be considered in the hands of the executors, (being in the hands of the defendant, their agent,) the action cannot be supported, because no refunding bond has been given.

Reply. The executors cannot be sued by the plaintiff: they have never received the money, but have authorized the defendant to keep it for his own use. As to a refunding bond, fifty years have elapsed since the decease of *J. Phillips*, and there is no probability of unpaid debts. But the defendant is liable, as he claims under a breach of trust, and stands in the place of the executors.

The opinion of the court was delivered by

DUNCAN, J. The right of the plaintiff depends on the construction of the clauses in the will of *Jacob Phillips*, by which he directs his executors to sell his real and personal estate, and "that the interest of one half of the proceeds shall yearly, and every year, be paid by his executors to *Hannah Nunez*, her heirs and assigns for ever, during her natural life. But, in default of issue of the said *Hannah Nunez*, the said moiety of the principal and interest shall descend to the next of kin, or heirs at common law, and their heirs and assigns for ever." And the question is,—did the whole moiety of the principal and interest vest absolutely in *Harriet Nunez*, or was the limitation over to the next of kin good? The difficulty in encountering a question of this kind, arises from the multitude of contradictory cases, now swelled at least to one hundred. Most of the leading ones have been marshalled and arranged in this argument. It would be a futile attempt to endeavour to remember them all, and to com-

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ment on them particularly would be time misspent. It will be more satisfactory to lay down some generally conceded principles and rules of construction, which have become rules of property, drawn from decisions, than tediously to refer to the particular authorities. Personal estate cannot be entailed. It makes no difference, in regard to the rules of construction, whether the use, interest, or profits be given with a limitation over of the thing itself, or a bequest of the thing itself. This was formerly a fine-spun distinction, which in process of time, as personal property increased in estimation, and the liberality of courts extended, has been long exploded; and it is now perfectly settled, that whether it be a bequest of the thing itself, or its use, makes no difference. The general principle is, that where there is a limitation of a chattel, by words, which, if applied to freeholds of inheritance, would create an estate tail in personal estate, the whole interest vests absolutely in the first taker. There is a distinction, however, as to the words, dying without leaving issue, between a devise of real and personal estate; in the former, generally, they seem to be construed to mean indefinite failure of issue,—in the latter, issue at the time of the death of the first taker. The distinction between the same words in the same will, when applied to the different kinds of property, was first taken in *Forth v. Chapman*, and though there are respectable opinions opposed to this, the distinction is settled, not only in *England*, but where the question has been considered in the several courts of the *United States*. In *Massachusetts*,—8 *Mass. Rep.* 39. In *Virginia*,—*McCall*, 338, and 2 *Munf.* 479. In *South Carolina*,—4 *Desauss.* 330. And, in *New York*,—10 *Johns.* 12. And the principle has been acknowledged, though not perhaps actually decided in our own courts. But this consideration is not necessary in the present inquiry; for the question is, and it is a narrow one, whether the bequest of a chattel interest for life, and no particular bequest to the issue, but limited over in default of issue, the limitation over is good. This shortens our inquiry, and precludes the necessity of travelling over the whole field; for there is no circumstance, nothing in the will to confine it to issue living at the death of the first taker; and it does not seem necessary to effectuate the general intention of the testator so to construe it, but rather the contrary; for nothing was intended to go over, until the expiration of the whole generation of *Hannah Nunez*, and I think it may be safely stated, that there is no case to be found in the multitude of decisions, in which the words, dying without issue, *standing alone*, have received a different construction in the bequest of personal estate, and a devise of land; and they mean, in both cases, indefinite failure of issue. The only difference is, that in personals the court lays hold of any other word to give effect to limitations that otherwise would be bad, to effectuate the intention of the testator; but, in a devise of lands, construing them in-

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definite failure of issue, gives the devisee an estate tail, provides for the issue, and the second devisee would take as a remainder. The law does not regard the circumstance, that the tenant in tail may bind all by common recovery.

The reason why, where a bequest for life is to one, and nothing directly given to issue, but limitation over in default of issue, it vests the absolute interest in the first taker, is given by Chief Justice KENT, in 10 *Johns.* 15: "If a man gives an estate in general to A. for life, and adds, *but if he die without issue*, and then gives it to B., B. has no immediate gift, but only a contingent interest, on A's. dying without issue; and it would counteract the intention of the testator, if B. took it immediately on the death of A.; therefore, *ex necessitate rei*, these words operate an enlargement of the estate for life; for otherwise the issue of A. would not take at all, and B. would take the whole. It is necessary that A. should take an estate which must devolve upon his issue, and upon that ground his estate is extended beyond an estate for life; and, in a freehold inheritance, it is decreed to be an estate tail, and, in a chattel interest, an absolute property. A. must be considered as taking for the benefit of his issue, as well as of himself, and he must take so that the property would be transferable through him to his issue, and this can only be by his being considered as taking an estate tail in the one case, and possessing the whole interest in the other."

The consequence of any other construction, it may be added, would be, that as no interest springs to B., and no express estate is given after the death of A., the intermediate interest would be undisposed of, unless A. was considered as taking for the benefit of his issue, as well as for himself. But as an estate in chattels is not transferable to the issue in the same manner as lands, and not capable of any kind of descent, the whole interest is given to the first taker. 2 *Roper on Legacies*, 394. And though this appears to be artificial reasoning, yet the rule is founded on the nature of the two kinds of property, and here is recommended as the only one by which the general intention of the testator can be effectuated. The intention is clear, to transmit the legacy to all the issue of *Hannah Nunez*. That in real estate would be an estate tail; but as personal estate cannot be entailed, the absolute interest vests. Issue through all time, indefinite failure of the first taker,—nothing to go over, but on failure of the whole race; and courts cannot vary the construction, according to subsequent events.

It is to be understood, that this opinion is founded on the consideration that the limitation vests upon the extent and import of the words, *in default of issue*, without the concurrence of any restrictive intention to narrow them down to issue of *Hannah Nunez*, living at her death; for if there were such circumstance of intention, the limitation would have been good; as was decided

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by this court, in 2 *Serg. & Rawle*, 62, and 6 *Serg. & Rawle*, 29. There it was held, that those words, standing alone, would not, *ex vi termini*, signify a dying without issue then living. To restrain them, there must be some apparent restrictive intention,—some clause—some circumstance in the will, which would indicate or imply such intention. A definite failure of issue, is where a precise time is fixed, not in express words, but inferrible with reference to some particular time, or event. There is no time here, no event referred to except one—death without issue. The word issue, unattended by any circumstance of contrary intention, is required for the purpose of limiting this general sense of the word. The absolute interest in this moiety vested in *Hannah Nunez*, and passed to her executor, the plaintiff.

But it is contended, there can be no recovery against this defendant. Now the bond on which the defendant received the money, under the authority of the executors of *Phillips*, expressly states that it was the very trust money lent out in pursuance of the directions of his will: the interest to be paid to *Hannah Nunez* during her life; the principal, on her death, to go according to the directions of the will. It was this very trust that came into the defendant's hands, with his knowledge. The misapplication of this money to his own debt was a breach of trust in which the defendant with notice participated. The trust money can therefore be followed into his hands, as money had and received for the *cestui que trust*, the plaintiff. He has the money of those beneficially interested, with notice, when he received it, that it was theirs. Every principle of natural justice calls on him to refund it. I do not see any good reason why he should not repay it with interest. He has converted the money, or claims to convert it to his own use. The interest is but a just compensation for this detention. Judgment must therefore be rendered for the plaintiff on the verdict.

Judgment for the plaintiff.

[PHILADELPHIA, JANUARY 17, 1827.]

WITMER and others *against* SCHLATTER and others.

Plea in abatement is too late after a general imparlance.

Where the defendants have in one action abated the suit by pleading other persons joint contractors not named in the writ, and a new suit is brought, a similar plea in abatement will not be allowed in such second suit, though put in by the defendants, who were not parties to the first suit.

THIS was a motion by *Kittera*, for the plaintiffs, to strike off a plea in abatement, filed by *Charles Bird*, *Thomas Earp*, and

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Robert Earp, three of the defendants, that "the said several promises and undertakings in the said declaration mentioned, (if any such were made,) were made jointly with one *George Earp*, who is still living, viz. at the county of *Philadelphia*, and not by the defendants in the above suit alone." The suit was brought to *July Term*, 1824: the declaration filed on the 29th of *June*, 1825: rule to plead in six weeks, or judgment, on the 11th of *July*, 1825; and the plea in abatement was filed on the 25th of *August*, 1825. A former suit had been brought against some of the persons who were defendants in this suit for the same cause of action, and was abated by a plea in abatement that all the parties were not joined; but the present defendants were not defendants in that suit.

Kittera now moved on two grounds:—1. Because the plea was put in too late. There can be no plea in abatement after a general imparlance. 1 *Tid's Prac.* 418. 2 *Browne's Rep.* 174. 2. Because there had been a plea in abatement already in a former action, that the proper parties were not sued, and there cannot be a second plea in abatement of the same nature in the same action. *Ib.* 589.

Randall and *Chauncey*, contra. The plea was entered the same term that the *narr.* was filed. 2. Though there cannot be two pleas in abatement in the same action, yet there may be several pleas in abatement, if several suits are brought between the same parties; but in this suit the parties are different. The defendants, who offer this plea in abatement, were no parties to the first suit.

Reply. The defendants who offer this plea, are barred by the plea put in by their partners in the first suit. The plea is too late. After general imparlance, the defendant may plead in abatement before *narr.* filed.

ROGERS, J., and HUSTON, J., were not on the bench at the argument, and gave no opinion.

The opinion of the court was delivered by

DUNCAN, J. This is a plea in abatement, and the cause was, "that the promises, if even such promises as are laid in the declaration were made, were made with one *George Earp*, who is still living." The plaintiffs moved to strike off this plea, because put in too late, and because there had been in a former action a plea in abatement, *that all the proper parties were not sued*, and the action abated. To this it has been answered by the defendants, that the defendants who now put in this plea, were not sued in the first action; and the plaintiffs reply to this, that the defendants are all bound by the plea of their partners in the former action.

The plea is a plea in abatement; for where any person who ought to be joined as a defendant is omitted, this is pleadable in abatement only, and not in bar; because such plea is to give the plaintiff a better writ, which is the true criterion to designate pleas in

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abatement from pleas in bar; and certainly such plea comes too late after a general imparlance; for this is an objection which applies to the writ itself, and the court holds a strict hand over dilatory pleas, and will not suffer a departure from the usual forms of pleading in these cases. But if the plea had been put in in time, it ought not to have been received; for in this form of plea in abatement, that all the contractors are not sued, the defendant must give the plaintiff a better writ. 1 *Saund.* 284, note. Therefore it is, that in a plea of misnomer in the Christian name of the defendant, the defendant must show what his Christian name is, and also what is his true surname, and this although the true surname be already stated in the declaration, lest the plaintiff should be defeated a second time by error in the names; for those pleas tending to delay justice are not favourably received, and the rule was adopted to check the repetition of these pleas in abatement. *Stephens' Principles of Pleading*, 435. And this sensible writer, (in a book of small bulk, but which contains much useful matter,) gives the meaning of the rule, that the defendant must give the plaintiff a better writ. It is, "that pleading a mistake in form, in abatement of the writ, the defendant must at the same time correct the mistake, so as to enable the plaintiff to avoid the same objection in framing his new writ." The defendants cannot say that they have corrected the mistake here, so as to enable the plaintiffs to avoid the same objection in a new writ, when they take the same objection to the new writ itself, the non junction of all the contractors. They cannot say they have given him a better writ, and yet repeat the same objection to the new writ; a matter so perfectly within their own knowledge as the names of all the secret partners would be. Nor is it any thing but mocking, to say one of the new defendants had no former opportunity to put in this plea; for, if it could be sustained, the plaintiffs' suit never could terminate in a trial on the merits. He might bring action after action, and every new defendant give one new name at a time. In the case of secret partners, it is hard enough for a plaintiff to be once put out of court for a mistake which he could not know, and which was scarcely known to any other than the ostensible partners themselves; but to put him one hundred times out of court, which are the principles contended for by the defendants, where the associates are numerous, would be excluding him so long as the associates please. The defendants did not give the plaintiffs a better writ, did not make known to them that which in fairness they ought to have done,—the names of all the partners. Instead of correcting the mistake, and enabling them to avoid a repetition of the error, they lead them into a labyrinth, from which they cannot find out his way by any clue. The defendants should have given the plaintiffs all the names at once: that was the way to correct the error. The plaintiffs could not then have been defeated a second time for the same cause, namely

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the omission of the names of all the joint contractors. The plea admits, that if there is a cause of action, it is a joint one. The allegation is, that all the joint contractors were not named, the very plea put in before; and the very plea that might, if this action is abated, be used again and again and again. The plea is in the way of justice, which the court ought to discourage. To suffer its repetition, would bring a reproach on the proceedings in courts of justice; the mischief to the plaintiffs incalculable, while it inflicts no injury on the defendants, for all the partners would be entitled to contribution, and courts ought never to suffer pleading, which is said to be a great excellence in our jurisprudence, and to be founded on strong sense in the choicest and soundest legislation, to be made the instrument of oppression to the suitors. I speak of the consequences of suffering the plea in abatement to be thus used, without any relation to this particular case.

Plea in abatement struck off.

[PHILADELPHIA, JANUARY 27, 1827.]

WHELEN *against* WATMOUGH and another.

In account render by one partner against two, charging them as bailiffs and receivers, the plaintiff must show a joint liability on the part of the defendants to render an account to the plaintiff.

THIS was an action of account render brought by *Israel Whelen* against *John G. Watmough* and *Israel Downing*. It was tried in *November* last at *Nisi Prius*, before DUNCAN, J., and a verdict rendered in favour of the defendants. The case now came before the court on a motion made by the plaintiff for a new trial.

The declaration charged in the first count, that *John G. Watmough* and *Isaac Downing*, merchants trading under the firm of *Watmough and Downing*, late of *Philadelphia* county, from the 24th day of *May*, in the year of our Lord 1818, to the 1st day of *January*, in the year of our Lord 1821, were the receivers of the monies of the said *Israel Whelen*, as by the law merchant he can reasonably show, and during all that time received of the monies of the said *Israel Whelen*, at the county aforesaid, by the hands of the said *Israel Whelen*, *Jacob Lex*, *William R. Thompson* and Co., *Jacob Hassinger*, *William Spohn*, *Edward Lane*, *Michael Riter*, and *William P. Israel*, fifty thousand dollars, to merchandize with, and make profit for them the said *Israel Whelen* and the said defendants, and thereof to render the said *Israel Whelen* a reasonable account on demand.

Second Count. And, also, whereas the said defendants were

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the bailiffs of the said *Israel Whelen* from the said 24th day of *May*, in the year of our Lord 1818, to the 1st day of *January*, in the year of our Lord 1821, and for the same time had the care and administration of divers goods and merchandize, to wit, one hundred and eighty powder kegs, nineteen and a half cords of willow wood, six hundred and twenty-three kegs of gunpowder, two hundred and fifty-eight bags of saltpetre, sixty-three boxes and seven tierces of saltpetre, at the county aforesaid, to merchandize, and make common profit thereof, for the said *Israel Whelen* and the said defendants, and to render a reasonable account to the said *Israel Whelen*, when afterwards they should be thereunto required.

Nevertheless the said defendants their reasonable account aforesaid of the time, monies, and goods aforesaid, to the said *Israel Whelen* have not yet rendered, although requested, &c.

The plaintiffs pleaded, never bailiffs or receivers, and fully accounted, and the cause was tried on these issues.

On the trial, it appeared that the parties had been partners in business under the firm of *Watmough* and *Downing*. The defendants contended, that there could not be a verdict for the plaintiff, unless the jury found a joint liability, on the part of the defendants, to render an account to the plaintiff, whatever might be their separate responsibilities to the plaintiff. And the learned judge being of that opinion, instructed the jury accordingly. And this was the ground of the motion for a new trial.

Tilghman and *C. J. Ingersoll*, for the plaintiff, now contended that if the defendants were separately liable to account to the plaintiff, the action was well brought, and judgment *quod computent* might be entered against them, on which a separate account might be taken by auditors, and separate judgments rendered. The inconvenience would be excessive, if it should be held necessary to bring separate actions against each partner; and it has been the policy of *Pennsylvania* to foster and enlarge the remedy by action of account render. 1 *Dall.* 339. *Gratz v. Phillips*, 5 *Binn.* 564. In the latter case, the court decided that the plaintiff might have judgment for a larger sum than the damages laid in the declaration, and might recover for articles in account which had accrued pending the action. In *Griffith v. Willing*, 3 *Binn.* 317, the suit was by *Griffith*, surviving partner of *Nicklin*, against *Willing and others*; and it was held that joint partners in a mercantile adventure may have account render against each other by the common law, tenants in common by the 27th section of 4 *Ann.* c. 16, which section has been adopted in *Pennsylvania*. *Robert v. Andrews and Wife and Cocket*, *Cro. Eliz.* in error, was a case of account brought by several against one: so, in *Dighton v. Whitney*, 1 *Lutw.* 51, account render by several plaintiffs. In *Plead. Assist.* 35, is a precedent of a declaration in account render by one against two, charging them as bailiffs and receivers for

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the common benefit of all the parties. They further cited *Watson on Part.* 396. *Gill v. Kuhn*, 6 *Serg. & Rawle*, 336. They contended, moreover, that as one of the pleas was *fully accounted*, it confessed the accountability of the defendant as laid in the *narr.*

J. R. Ingersoll and *Chauncey* supported the opinion of the judge. The *narr.* does not state that the plaintiff and defendants were partners, but it states that the defendants were merchants, in company, trading under the firm of *Watmough* and *Downing*. The question is, whether the plaintiff can have a joint judgment *quod computent* against the defendants, and finally recover against each separately what was due from him. This could not be. The responsibility of the defendants is in its nature several. If the first judgment be joint, the auditors must charge the defendants accordingly. There cannot be judgments for different sums in an action on contract against two defendants in a joint action. *Williams v. M'Full*, 2 *Serg. & Rawle*, 280. In *Beech v. Hotchkiss*, 2 *Conn. Rep.* 425, it is held that an action of account render does not lie by one partner where there are more than two partners: in such case, he must go into equity. No instance of the mode of proceeding proposed by the plaintiffs is to be found: wherever the suit is joint, the liability must be joint. In *Griffiths v. Willing*, the plaintiffs were partners, and the defendants constituted a separate partnership firm. They referred to 1 *Vin.* 151, 152. *Schw. N. P.* 5. *Godfrey v. Saunders*, 3 *Wils.* 88. *Wright v. Guy*, 10 *Serg. & Rawle*, 227. *Eccleston v. Clipsham*, 1 *Saund.* 153. *Reese v. Abbott*, *Cowp.* 832. 2 *Vin.* 58. 3 *T. R.* 782. *Brooke's Ab. Joinder in Action*, pl. 83, *ib.* *Tenant in Common*, pl. 4. *Cowel v. Edwards*, 2 *B. & P.* 268. 3 *B. & P.* 235. *Cro. Jac.* 410.

The opinion of the court was delivered by

DUNCAN, J. When the objection was first made, that there could not be a verdict and judgment for the plaintiff *quod computent*, unless the jury found a joint liability of the defendants to render an account, I was impressed with the opinion that it was unanswerable. It seemed to me that it would be unsettling first foundations, to say that one man should be answerable for another, where there was no express contract, and where, from the nature of the consideration, there could be none implied. I did not then believe it to be the law, and so I instructed the jury, that on the plea of never bailiffs or receivers of the plaintiff, unless they found that this was a house of partnership, consisting of two parties, the plaintiff one and the defendants the other, their verdict should be for the defendants; for if this was a partnership of three,—*Whelen* holding one half, *Watmough* one fourth, and *Downing* one fourth, then *Watmough* would not be bound to account for *Downing*, nor *Downing* for *Watmough*. It then appeared to

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me that this was not a technical objection to the mere form of action, but one of substance; and that if the verdict was for the plaintiff, that the defendants should account, the judgment must be *quod computent*, and that the report of the arbitrators must follow the judgment, which, being joint, the report must be joint. I did not then conceive the second judgment in account render could be different from the first judgment, and separate judgments rendered against each defendant, and that there might be different executions: nay, that one defendant on this joint contract might be discharged, and the other charged. All this appeared new and strange to me; but as the action was not much in use, and as there were some peculiarities in the action and the judgments, and not many decisions to be found in the books, but only notes and hints clashing with each other, and the more we look into the books, as was said by WILLES, C. J., in *Godfrey v. Saunders*, 3 Wils. 113, the more difficult it seems to reconcile them, the point was reserved,—my mind was open to conviction, and my curiosity was whetted to find out some anomaly in the law, if it had ever existed. The laborious researches of the counsel for the plaintiff have failed in producing any case, or even *obiturn dictum*, to support the proposition that the action of account render did present such incongruity. I have taken some pains to examine both the ancient and modern books on this subject. In the modern, there is not much to be found on this action, but enough to show that the anomaly did not exist; and the ancient books abundantly prove that in no period of the history of the law it ever did exist.

Whatever may have been the inconveniences of this action, it is not chargeable with those pointed out; for each party interested may have his separate action for his own interest, against every one who has received his money, and recover from him that portion which has come into his hands unaccounted for by him. I cannot agree with the learned judges of *Connecticut*, that when there are more than two partners, the action of account render will not lie. But if it were even so, it would not move me, because the party in this state might find it difficult to procure redress, to suppose that the court could change the law, much less, that a judge at *Nisi Prius* could undertake to change the nature of the action. Undoubtedly, in the case of intricate actions, where there is a court of equity, parties have usually sought redress there, because in that court the remedy is more adequate, relief is not embarrassed with the difficulties which would incumber it in a court of law; but I do not think judicial authority would change the nature of the action. For, if they could do so, then they might make a very convenient regulation, that the first jury should ascertain the sum, and the first judgment be a final one. This court has decided, that the mode of conducting the action shall be according to the principles and practices to be found in the books, and corrected a practice that had before prevailed.

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The entries and books of practice remain then as our only guide. The law wants no reformation in this particular; for it is, that each man should render to each man a just account. The finding of the jury excludes all conclusion of joint liability: it necessarily finds a separate liability; for so was it put to the jury. But a separate liability which cannot be enforced through the medium of a joint action; for if *Watmough* and *Downing* can be brought into court together in this joint action, the plaintiff might bring all his receivers to account in one action, and auditors find the several balances due by each, and include every name in the city directory. If two men are intrusted with the goods of another, to merchandize, a confidence is placed in *both*. They accept the trust jointly, and jointly confide in one another. The receipt of one is the receipt of another, and therefore it is a joint receipt. Both are liable, for by implication each has undertaken to account for the other; and that is the very marrow and substance of *Godfrey v. Saunders*. *Saunders*, who survived *Solomons* his co-partner, was held responsible for his acts and embezzlements; because, as the court said, they were co-obligors, and answerable for one another for the whole. But here the verdict negatives all this. It finds that *John Watmough* and *Andrew Downing* were not co-obligors; that one was not surety for the other, and that, of consequence, each man of them is liable for his own receipts. The fact is, if this action could be sustained, then *Watmough* might have brought his action of account render against *Whelen* and *Downing*, or *Downing* his against *Whelen* and *Watmough*, and made *Whelen* the security of each of the others. The case of *Godfrey v. Saunders* goes far to prove the law of that day as I have stated it; for it must be admitted that the judgment here would be *quod computent*,—not that *Watmough* should render an account for his receipts and *Downing* a separate account for himself. Where two are judged to account, and one is outlawed and the other accounts, if he discharges himself upon the account, this shall be a discharge of the other; and if he be charged on the account, this shall charge the other, because they were adjudged to account jointly. 41 *Edw. 3.* 13 *b. Br. Acc. pl. 10.* *Fitzg. Acc. pl. 23.* 1 *Mallory Plead.* 69. 1 *Rol. Abr.* 173. 1 *Vin. Acc. Discharge before Auditors, pl. 3.*; and, in the same page, if two in a writ of annuity are judged to account, and one is afterwards outlawed, the other shall account, because they were judged to account jointly. So, if two are judged to account, and one dies, the other shall account alone. And for this reason, because the receipt of one is the receipt of both. 1 *Browne*, 25. Where two are accountable, an account made by one is not good; *for both the accountants shall make but one account.* Cited by *Coke*, as the case of *Gore v. Dowling*, in the Exchequer Chamber, upon a writ of error. 1 *Leon.* 234. If an account be against two, and one pleads that he was sole receiver, and had accounted before such an auditor, if the plaintiff replies,

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unto his bar, he shall abate his writ, because the receipt is supposed to be a joint one. *Godb.* 43, *pl.* 50. *Cro. Jac.* 410. 1 *Rol. Rep.* 421, proves clearly two things,—first, that where there are three partners in thirty-eight tuns of wine, each concerned one third in value, that any of them might bring his action of account render against any other of them; and, secondly, that one of them might have his action of account alone, without his companion. See 1 *Mallory*, 71, *Plead. tit. Rules and Observations in cases of Account Render*; in which this case is so noticed. It appears by the report of *Croke*, that the exception was taken, that the plaintiff demanded a third part of such goods: whereas he alone ought not to demand the account, but ought to join the other with him, and if he should have it sole, yet he ought to demand the account for them entire, and not to demand it of the third part,—*Sed non allocatur*. For it was held he might sue, though his companions would not, and that he might demand an account of the third part. These authorities fully prove, that a judgment *quod computent* is a joint judgment, or a joint receipt, and that only one account can be rendered. And whoever will take the pains to examine the pleadings in *Godfrey v. Saunders*, 1 *Wils.* 94, will find it to be this very case. It was an action of account against *Saunders*, to render an account of the time in which the defendant and one *Solomons*, then deceased, was the bailiff of the plaintiff. In his third plea, the defendant pleads that he left the coral beads in the hands of *Solomons*, who alone was answerable. To this plea, *inter alia*, the plaintiff replied, that the consignment was made to and accepted by the defendant and *Solomons*, as joint factors, and upon their joint credit. The jury found for the plaintiff on all the issues. The defendant tendered the same plea, in effect, before the auditors; but held that he was concluded on the face of the record, and that this plea was contradictory to the finding of the jury, and nothing could be pleaded before the auditors contrary to the verdict of the jury. So, if the jury had found for the plaintiff here, they would have found a joint liability, and the defendants would not be suffered to plead a separate liability before the auditors; for that would have been to admit a matter to be pleaded again, which had been litigated and tried, and which would contradict the record. The act of the 30th of *March*, 1821, *Purd. Dig.* 24, relating to proceedings in actions of account render, extending the power of arbitrators to this form of action, proceeds on the same principle. It gives them a power not possessed by a jury; that is, to report a balance due to plaintiff or defendant, one balance, not several balances; and the idea of reporting and giving several judgments, and issuing several executions against several defendants for respective balances, was never in the mind of the framers of that act. The account to be reported is to result in a balance, either to one party or the other, and for this there is to be one final judgment. There is no machinery in the arbitration

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system to work it in any other way, no provision for appeal in any other way. Where the plaintiff sets out in a joint action a joint contract, it never can be split up into several causes of action, in which different sums may be given,—nor several executions issue on a joint judgment for different sums of money. The action of *account render* is founded on a contract express or implied. 3 *Yeates*, 251. The liability to account for the profits of an infant's estate, is said to be an exception. And, as to the power of the court to change that which by the law of the land is established as a course of judicial proceedings, I must deny it. No power short of the legislature can change that. The case of *Griffith v. Willing and others*, on which the plaintiff's counsel so much rely, was in direct accordance with the principle of joint action in this case. The parties there, were *Nicklin* and *Griffith* on the one side, in the connexion, and *Willing* and *Francis*, *Gilmore* and *Bingham*, on the other side, concerned in a large cargo, the funds of which belonged to those two parties in equal moieties. They were two houses concerned in the transaction; two partners, *Nicklin* and *Griffith*, one; *Willing* and *Francis*, and their associates the other. The latter were jointly accountable to the former. In the precedent from *Pleader's Assistant*, it was a declaration by the owner of land against two jointenants, as bailiffs, jointly bound to render a share of the profits of the land to the landlord, the plaintiff. But this was a tripartite partnership,—*Whelen* one half, *Watmough* one fourth, and *Downing* one fourth. It is the opinion of the court, that the exceptions to the charge have not been sustained; and the verdict, it is admitted, is not against the evidence. Something was said in the conclusion of the argument, as to double pleas. Never bailiff or receiver is the general issue, because it goes to the root of the action: fully accounted, is like the plea of payment added to the general issue. *Non est factum* or *non assumpsit*, the plea of payment added to *non est factum*, does not admit the deed: it puts that in issue. So, never bailiff or receiver denies accountability. It is no more than saying, "We never were joint bailiffs and receivers; but if you prove we were, then we will show that we have fully accounted." The jury were told, that if they found the defendants to be joint bailiffs and receivers of the plaintiff, their verdict should be for him; for if they were joint bailiffs and receivers, they had not fully accounted. This is not the first time this kind of objection has been raised in this court. In 5 *Serg. & Rawle*, 411, a similar objection was made and overruled. If, because the defendants have added a plea of fully accounted, they acknowledged the liability to account, it would be an admission of record, and the jury would be confined to the inquiry on the plea of fully accounted. We have in this state allowed this mode of pleading, as in *non est factum* to an obligation, and payment. The deed is not admitted, for that is for the jury to find. If they do find the

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deed, then the inquiry is, as to payment on the second plea. It is the common course so to proceed in account render. There is a common sense rule in these things. They are considered as distinct and independent pleas, and to be proved as if each had stood alone. This is our practice and our law. It is therefore the opinion of the court, that the rule should be discharged and judgment entered on the verdict.

Rule discharged.

[PHILADELPHIA, JANUARY 27, 1827.]

The Commissioners of SPRING GARDEN *against* SMITH.

IN ERROR.

The words of the proviso of the act of the 9th of *March*, 1826, exempt the owners of a lot at the corner of Vine and Wood Streets, extending more than fifty feet in depth along Wood Street, from assessment, for defraying the expense of pipes, for fifty feet of that depth.

ERROR to the Court of Common Pleas of the county of *Philadelphia*, where judgment was rendered in favour of the defendant on the following case stated for the opinion of the court:

By the act of assembly, passed the 9th of *March*, 1826, entitled, "a further supplement to an act, entitled, 'an act to incorporate the District of *Spring Garden*,' it is provided, that the board of commissioners of the said district, or a majority of them, shall have full power and authority, upon the application in writing of the owner, or a majority of them, of real estate in any square or two squares of any street, lane, road, or alley, where the pipes may have been then laid, to introduce into such square or two squares, of any such street, lane, road, or alley, the *Schuylkill* or other wholesome water, for which the said commissioners have, or such square or two squares of such street, lane, road, or alley, and such other estate as make use of the same, shall and may be taxed by the said commissioners for all the expenses that may be incurred in laying the said pipes, introducing the said water into such square and two squares, and keeping up therein the necessary supply of water in proportion to the said respective pipes of the said real estate, and calculating the size of the said pipes at six inches, and shall be liable and chargeable with the same, &c.; provided, that all corner lots extending more than fifty feet in depth from any street, lane, road, or alley, in which pipes shall be laid, and the water introduced, shall pay for such excess in depth, at the same rate whenever pipes are laid, and the water introduced

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into the same." On the 25th of *April*, 1826, the city of *Philadelphia* contracted to supply the District of *Spring Garden* with *Schuylkill* water. The lots and houses on the north side of *Vine* Street are within the said district, and had been supplied with water from the city mains laid in *Vine* Street, and within the city, previous to the date of the said contracts. On the application of a majority of the owners of property within the square, the said board of commissioners have caused pipes to be laid in *John* Street, from *Vine* to *Wood* Street. *Newberry Smith*, the defendant, is proprietor of a lot at the corner of *Vine* and *John* Streets, within the said incorporated district, on which is erected a dwelling-house, the front door of which is in *Vine* Street, but there is no door on *John* Street. The lot is twenty-one feet front on *Vine* Street, and extends on *John* Street ninety feet two inches. The question for the opinion of the court is, how many feet are to be assessed and paid for by the said *Newberry Smith*, for the expense of the pipes laid in *John* Street.

Chew and *Mahany*, for the commissioners.

Rawle, contra.

The opinion of the court was delivered by

TILGHMAN, C. J. This cause was decided in the Court of Common Pleas on a case stated in which all the necessary facts appear. The defendant is the owner of a house and lot at the corner of *Vine* and *John* Street, containing twenty-one feet in front on *Vine* Street, and extending northward ninety feet on *John* Street, preserving the same breadth of twenty-one feet throughout. The commissioners, by virtue of the power vested in them by the act of the 9th of *March*, 1826, and of their contract with the city of *Philadelphia*, dated the 25th of *April*, 1826, laid pipes for conveying the water from the main which had been laid by the city, in *Vine* Street, up *John* Street, as far north as *Wood* Street. And in the assessment, in pursuance of the act of assembly for defraying the expenses of these pipes, &c. the defendant was rated for his whole part of ninety feet on *John* Street. This would have been all right, if it had not been a corner lot. But the following proviso in this act distinguishes between corner and other lots:—"Provided, that all *corner lots*, extending more than fifty feet in depth, from any street, lane, road, or alley, in which pipes shall be laid, and the waters introduced, shall pay for such excess in depth at the same rate per foot as other property in the same street, lane, road, or alley, whenever pipes are laid and the waters introduced into the same." Now this was a corner lot, extending more than fifty feet from its front on *Vine* Street; and, as appears by the statement of the case, the owners of lots fronting on *Vine* Street, had the use of the water flowing in the main laid by the city in *Vine* Street before the pipes were laid by the commissioners of *Spring Garden*, in *John* Street. The case, therefore,

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falls within the words of the proviso. The legislature does not assign its reason for distinguishing between corner lots and others. But it is presumed it was supposed that the owners of the corner lots had been at expense in procuring the water in front, which would make it unreasonable that they should be assessed for laying other pipes at right angle the whole depth of their lots. Fifty feet, therefore, were allowed them free from assessment, beyond which the property was to be assessed. The commissioners contend, that as the main in *Vine Street* was not laid at the expense of the District of *Spring Garden*, the case is not embraced by the proviso. But this construction is not to be justified. When the act of *March 9th*, 1826, was passed, it was well enough known that the main in *Vine Street* had been laid by the city, and that the owners of lots on the north side of *Vine Street*, and of the city and within the District of *Spring Garden*, were to have the use of it, and that the city would take care to secure an adequate compensation for that use. It is not prudent, however, to form a construction on conjecture, against the words of a law. It appears to the court, that the words of this proviso are sufficiently plain, and that they exempt the property of the defendant from assessment, to the extent of fifty feet from *Vine Street*. It is our opinion, therefore, that the judgment of the Court of Common Pleas should be affirmed.

Judgment affirmed.

[PHILADELPHIA, JANUARY 10, 1827.]

HART *against* BOLLER.

IN ERROR.

The general rule is, that if a person indebted to another on a note gives him a new note for the same sum, without new consideration, it shall not be deemed a satisfaction of the first, unless so accepted: but whether so accepted, is matter of fact for the jury, and it is error for the court to take the question from the jury, and decide it as matter of law.

ERROR to the District Court for the city and county of *Philadelphia*.

This action was brought by *Jacob Boller*, the plaintiff below and defendant in error, against *Joseph Hart*, the plaintiff in error. The plaintiff declared in his first count, on a promissory note drawn by *Charles Miller*, payable to the defendant or his order, and indorsed by the defendant to the plaintiff, who discounted it. This note was dated *October 11th*, 1819, for two hundred and forty dollars, at sixty days. It fell due the 13th of *December*, 1819, and was protested for non-payment, and notice whereof was given to the defendant, the indorser. The second count was

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on a note for the same sum, drawn and indorsed by the same parties, dated the 14th of *December*, 1819, due *February* 15th, 1820. It was not paid, neither was it protested, or notice of non-payment given to the defendant. On the trial of the cause, it became a question whether the second note was in satisfaction of the first. The President charged the jury, "that this was matter of *law*, that the second note was not a satisfaction or discharge of the first, and therefore the plaintiff was entitled to their verdict on the first count." To this charge the counsel for the defendant excepted.

Miller and *Lowber*, for the plaintiff in error, cited *Chitty on Bills*, 371. *Smith v. Becket*, 13 *East*, 187. *Brown v. Maffey*, 15 *East*, 216. *Slaymaker v. Gundacker*, 11 *Serg. & Rawle*, 75.

Keemle, contra, referred to 9 *Serg. & Rawle*, 127. 11 *Serg. & Rawle*, 182. 5 *Mass. Rep.* 170.

The opinion of the court was delivered by

TILGHMAN, C. J. It is a general rule, that if one indebted to another by note, gives another note to the same person for the same sum, without any new consideration, the second note shall not be deemed a satisfaction of the first, unless so intended, and accepted by the creditor. But if so accepted, it is a satisfaction. The *quo animo* it was accepted is matter of *fact*, which the court cannot take to itself, and exclude the jury from the decision of it. The intent may often be deduced from circumstances, though nothing positive was expressed. We are of opinion, therefore, that the District Court erred in assuming the determination of this point, as matter of *law*. It should have been submitted to the consideration of the jury, whether the second note was accepted in satisfaction. The judgment is to be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.



CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—MARCH TERM, 1827.

[PHILADELPHIA, MARCH 27, 1827.]

DAVIS and another *against* HAVARD.

IN ERROR.

An award of arbitrators, under a submission at common law, fixing a boundary line between the parties, is conclusive.

WRIT of error to the Court of Common Pleas of *Chester* county.

The defendant in error, *David Havard*, a minor, who sued by his guardians, *John Elliott* and *John Marshall*, brought this action of trespass *vi et armis*, &c. against *John Davis* and *John Kugler*, the plaintiffs in error, for breaking and entering the plaintiff's close, and cutting down and carrying away his trees.

The defendants pleaded, *Liberum tenementum*, to which the plaintiff replied, freehold in himself and issue.

The controversy was in relation to a certain boundary line, and the following agreement, signed by the counsel, was returned with the record:—

“*September 28th, 1825, it is agreed that at the commencement of this suit, and when the alleged trespass was committed, plaintiff was seised in fee and possessed of a certain tract of land in the township of Tredyffrin, in Chester county, adjoining the lands of defendants, and that Isaac Davis, Esq., died seised in fee and possessed of a plantation and tract of land in the said township, adjoining*

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the lands of the plaintiff, which said land of *Isaac Davis* descended to his children and heirs; of one portion whereof *John Davis*, Esq., the above defendant, is now seised and possessed, and of the remaining portion thereof, *John Kugler*, the other defendant, is now seised and possessed; but nothing herein contained is in any way to affect the location of the lines between the said parties."

After the evidence on the part of the plaintiff was closed, the defendants gave in evidence the following agreement to refer the matter in dispute to arbitrators:—

"Whereas a dispute exists between *John Davis*, Esq., and *John Kugler*, farmer, of the one part, and *Benjamin Havard* of the other part, with respect to the line of division of their lands in the township aforesaid; and whereas the said *Benjamin Havard*, by letter of attorney under his hand and seal, duly executed, bearing date the 21st day of *February* last past, did constitute and appoint *John Elliott* of *Lower Merion* his true and lawful attorney for the purpose of settling the said dispute, &c., as in and by the said letter of attorney intended to be recorded in the recorder's office at *West Chester*, reference being thereunto had, more fully appears. Now know ye, that in order finally to ascertain, settle, mark, and establish the said line, we have mutually agreed to refer the same to *Mathew Roberts*, *William Wallis*, and *Elijah Funk*, arbitrators indifferently chosen between us, who are to meet and examine the same, and determine and fix sufficient landmarks between the said lands; (but if the said referees cannot agree, then the parties to agree to one or two men to be added to the reference,) and make report to us in writing within three months from the date hereof, which said marks so made and affixed, shall be and remain and be considered as the boundary line and division of the said land for ever.

"And it is further agreed between the said parties, that the report of the referees, together with this agreement, shall be recorded in the office for recording of deeds at *West Chester*, in the county of *Chester*, at the joint expense of the parties. In witness whereof, we have hereunto set our hands and seals, this twenty-eighth day of *April*, in the year of our Lord one thousand eight hundred and twenty-three.

"The parties further bind themselves, their heirs and executors, each to the other, firmly, in the penal sum of five hundred dollars, to abide by the report of the said referees."

This agreement was under seal, executed in the presence of a witness, acknowledged before a justice of the peace, and recorded in the office of the recorder of deeds of *Chester* county.

In pursuance of this submission, an award was made by the arbitrators, fixing the disputed boundary. This award was also under seal, was acknowledged by the arbitrators before a justice of the peace, and recorded in the recorder's office.

The defendants below, besides insisting that the record of the

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arbitrators was a bar to the recovery of the plaintiff, who claimed under *Benjamin Havard*, contended that he could not recover in this action, because the trespass alleged to have been committed by *John Davis*, was at a different time and place from that alleged to have been committed by *John Kugler*, and without concurrence between them; *John Davis* having removed his fence on to the line awarded by the referees in his own time and way, and *John Kugler* having cut trees within the line awarded for his boundary in his own time and way; and that at all events *John Davis* could not be liable in this action of trespass, without proof that he participated in cutting the trees; and they called on the court so to instruct the jury.

The court, having been requested by the defendants' counsel to reduce the charge to writing, filed of record a paper in these words:—

“The following is the substance of that part of the charge of the court on matters of law, which is requested to be filed of record by the defendants' counsel; viz

“The first question is, whether the defendants, or either of them, have committed the trespass. Trespass is an unlawful entry on the land of another. The injury complained of is the breaking of the close, entering into the possession of another, and doing some damage. The defendants are jointly charged with breaking the close and cutting down trees: it is said, that at all events *John Davis* is not guilty: the defendants joined in the appearance and pleas of not guilty; and if from the evidence you are satisfied that *John Davis* and *John Kugler* both entered on the land of the plaintiff, and one cut trees and the other removed a fence, they may both be found guilty of trespass in breaking and entering the close. And further, if one commands or advises a trespass to be committed by another, who does it, they are both guilty; for in trespass there are no accessaries. If, however, one of them has done no act, advised no trespass to be committed, nor broken any close, he must be acquitted. The place where the trespass is alleged to have been committed, must be in the possession of the plaintiff. The evidence in this case is, that the trees cut were within the possession of the plaintiff, and that the fence was moved on to his possession. On this mindr point of the cause, the jury will say whether either or both of the defendants are guilty, and find accordingly.

[Here the court remarked on the evidence of the line, and its application to the plea of *liberum tenementum*, and, on the subject of the submission by award, said,—]

“Unless the submission and award shall conclude the rights of the parties, whatever they may have been before, so as to enable the defendants to recover of *Havard* in ejectment up to the line of the referees, it is not conclusive on this plea of *liberum tenementum*, whatever the effect may be, in an action between the

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parties on the award, or for the penalty. The court is of opinion, that the submission and award is evidence for *Davis* and *Kugler*, to be considered with the other evidence in the cause, but it is not conclusive on the title, nor can it exclude the consideration of the other evidence; therefore, from the whole matter, the jury will decide, &c."

The counsel of the defendants excepted to the charge.

On the return of the record to this court, the following specifications of error were filed:—

"1. The charge of the court authorized the jury to find a verdict against the defendants for a joint trespass, although the acts proved on the trial and referred to in the charge, might have been separate and distinct, and without any concurrence between the defendants.

"2. If the jury had believed, from the evidence before them, that the alleged trespass and cutting trees by *John Kugler* was at one time and place, and without any participation of *John Davis*, and the alleged trespass and removing fence by *John Davis* was at another time and place, and without any participation of *John Kugler*,—still, the charge of the court justified a joint verdict against both defendants, as for a joint trespass.

"3. The charge justified a verdict against *John Davis*, although he might not have participated in, commanded, advised, or known of, the alleged trespass and cutting trees laid in the declaration.

"4. The court, in their charge, go the length of saying, that under a count for *trespass and cutting trees, trespass and removing a fence*, was sufficient to authorize a verdict against one of the defendants.

"5. The court erred in saying, that the submission and award were not conclusive against the plaintiff's right to recover."

When the cause was called up for argument, the court requested the counsel for the plaintiffs in error to confine their argument to the question whether or not the award was conclusive of the title, according to the boundary fixed by the referees. To this point,

Dillingham and *Binney*, for the plaintiffs in error, cited *Greer v. Boyd*, 11 Serg. & Rawle, 205. *Calhoun's Lessee v. Denney*, 4 Dall. 120. *Dixon v. Moorhead*, *Addison*, 216. *Kern v. Smith*, 2 Brown, 99. *Kyd on Awards*, 55 to 62. *Peebles v. Reeding*, 8 Serg. & Rawle, 84. 1 Madd. Ch. 66, 401. *Hall v. Handy*, 3 P. Wms. 187. *Ward v. Griffith*, *Swanst.* 53, 54. *Bourk v. Willer*, 4 Johns. Ch. R. 405. 2 Marsh. R. 438. *Buckly v. Stewart*, 1 Day, 130. *Doe v. Napier*, 3 East, 15.

Edwards and *Tilghman*, for the defendant in error, cited 1 Dall. 514. 1 Yeates, 353. 2 Yeates, 513. 4 Yeates, 243. 1 Binn. 59. 2 Binn. 582, (note.) 17 Johns. 405. 2 Vern. 514. 1 Atk. 64. 3 P. Wms. 362. 2 Vern. 705. 3 Atk. 644. 2 Atk. 501. 2 Vern. 109. 1 Johns. Ch. R. 101. 2 Vern. 100. 2 Ves. 315. 2

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Vern. 251, 444, 519. 1 *Rol. Rep.* 242, 244. 2 *Leon.* 104. *Cro. El.* 223. 5 *Binn.* 287. 8 *Com. Dig.* (last edit.) 112.

The opinion of the court was delivered by

TILGHMAN, C. J. This was an action of trespass, brought by *David Havard*, the plaintiff below, against *Davis* and *Kugler*, the plaintiffs in error, for breaking and entering his close, with force and arms, &c., and cutting down his trees, &c. The plaintiffs pleaded, not guilty, and *liberum tenementum*, &c., to which the plaintiff replied, "freehold in himself," and issues were joined.

The dispute was concerning a boundary line, and the defendants gave in evidence an agreement between *Benjamin Havard*, under whom the plaintiff claimed, and themselves, to submit the location of this boundary line to the arbitrament of three men, whose award was to be considered as fixing the said boundary line for ever. The parties to this agreement bound themselves respectively to each other in the sum of five hundred dollars, to abide by the award of the arbitrators. The defendants also gave in evidence an award in writing, made by the three arbitrators under their hands and seals, which was recorded in pursuance of the said agreement. The principal question on the trial was, whether the submission and award were conclusive on the plaintiff. If conclusive, the cause was with the defendants, who had entered and cut the trees, on their own side of the line established by the award. The President of the Court of Common Pleas charged the jury, that the submission and award were evidence for the defendants, but not conclusive; to which charge the counsel for the defendants excepted.

The question resolves into two points:—1. Whether the title to land can be bound by an award. 2. Whether chancery will decree a specific execution of such an award.

1. On the first point, the courts do not seem to have held a uniform opinion. It is certain, that an award cannot make an *actual transfer* of the title to land, and therefore, it appears in some of the old cases, an inference was falsely drawn that it was not conclusive on the title. Supposing that in strict law it was so, it did not follow that equity would not decree a specific performance, after which the award would become conclusive. No agreement short of a conveyance can make a transfer of land, yet it is the daily business of chancery, to compel the performance of such agreements; and with us, who have no chancery, a decree for specific performance is considered as made in all cases where a chancellor would make it. No satisfactory reason has been given, why the proprietors of land should not have as much power to bind the title by an award, as the title to personal property. The same policy which permits one, is applicable to the other; and indeed the fluctuation of sentiment on this subject seems at length to have settled down into an opinion conformable to common sense,—that the

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owners of property, either real or personal, may submit the title to the decision of arbitrators, whose award shall be conclusive. *Kyd*, in his treatise on awards, after mentioning the difficulties which had been raised by the judges in former times, comes to the following conclusion, (page 61,) "It may safely be considered as law, that when the parties might, by their own act, transfer real property, or exercise any act of ownership with respect to it, they may refer any dispute concerning it to the decision of a third person, who may order the same acts to be done which the parties themselves might do by their own agreement. Therefore, when we are told, that an arbitrator cannot make an award of *freehold*, and that he cannot award the freehold of one man to another, we are to understand these expressions to mean no more than that land cannot be transferred by the mere magic of the words of the award, but that it is necessary the award should order such acts to be done, as would, if done by the voluntary agreement of the parties, amount to a specific transfer." I believe, that in this short summary, the result of the decisions, down to the publication of *Kyd's* treatise, is pretty accurately stated. But it is worthy of observation, that in the case before the court, no difficulty about land occurs. No conveyance is ordered to be executed by one party to the other, because there was no occasion for one. Nothing but a question of boundary was submitted to the arbitrators. The dividing line being fixed, the title follows of course. The award is conclusive evidence of the boundary, and, consequently, conclusive evidence that the title of each party always extended to that boundary, and no further.

2. Now, then, as to the second point, why should not chancery compel a specific execution of such an award, as well as of any agreement respecting land? The agreement here was, that the line established by the arbitrators should be considered as the fixed boundary for ever. The award, then, may fairly be considered as the agreement of the parties to fix the boundary. Why should either party be allowed to recede from this, any more than from any other agreement? The circumstance of their having bound themselves in a penalty to abide by the award, for the recovery of which an action at law may be maintained, is of very little weight. The same objection arises in many cases, where a specific performance is decreed. The intent of the parties was, to settle all disputes touching the boundary, which intent cannot be carried into effect by an action for the penalty. Whatever might be the result of that action, the original dispute would still remain unsettled. Chancery, therefore, would go to the root of the evil, and fix the boundary according to the award, which would make an end of all disputes. I think the law is well settled, that a specific execution of an award concerning the title of land, will be decreed in equity. In 1 *Madd. Ch.* 401, it is said to be clear, that a bill will lie for the specific performance of an award, even though the award be

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unreasonable, the arbitrator being a judge of the party's choosing, and the award being considered as ascertaining the terms of a previous agreement. But though, if the award decide any thing to be done respecting *land*, the court, it seems, will decide a specific performance, it will not execute an award for the *payment of money*. In *Bishop v. Bishop*, 1 *Ch. Rep.* 142, and *Hall v. Hardy*, 3 *P. Wms.* 187, a specific performance of awards concerning land, was decreed. In these two cases the plaintiff had performed some part of the award. But in *Norton v. Moscall*, 2 *Vern.* 24, where a similar decree was made, no part of the award had been performed. All that the plaintiff had done, was the selling off a piece of land in order to raise a sum of money which he was ordered by the award to pay to the defendant. And in this case the award was so badly drawn, as not to be binding at law. So that *part performance* by the plaintiff does not seem to be essential for the support of his bill. Nor is there any reason why it should be considered as essential, provided the plaintiff holds himself ready to perform his part. The case of *Sellick v. Sellick*, decided by the Supreme Court of *New York*, (15 *Johns.* 197,) is directly in point. It was there held, that an award *fixing a boundary line of land* between the parties to the submission, was a justification in an action of trespass brought against the party who entered and cut trees, on his own side of the line fixed by the award. In *Bouk v. Willer*, 4 *Johns. Ch.* 405, Chancellor KENT corrected what he considered as a *clear clerical error*, in an award concerning land, and decreed a specific performance. In *Shackelford v. Purket*, 2 *Marsh. Rep.* 470, it was decided by the Court of Appeals of *Kentucky*, that although an award cannot *convey the title* of land, still it is binding on the parties, and estops them from disputing the title affirmed by the award. But the counsel for the plaintiff in the present case, relied on the decisions of *our own courts*; so that it became necessary to review the *Pennsylvania* cases. The strongest in favour of the plaintiff, is *Dixon's Lessee v. Moorhead*, tried before M'KEAN, C. J., and SMITH, J., at *Nisi Prius*, in *Westmoreland* county, in *May*, 1798. That was an award at common law, and it was held not be conclusive as to the title of land. The same question, between the same parties, had come before the Court of Common Pleas of *Westmoreland* county, at *June* Term, 1794, when a verdict was given against the award, but a new trial was granted at *December* Term, 1795, President ADDISON having changed his mind after the trial, and being of opinion that in his charge to the jury he had not given sufficient weight to the award. For the opinions of Chief Justice M'KEAN and Judge SMITH, I entertain a sincere and high respect, but it must be remembered that this was a *Nisi Prius* decision, which we all know is not of the same authority as a judgment in bank. The same judges who have necessarily decided in haste at *Nisi Prius*, often came to a different conclusion after a full argu-

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ment in bank. Thus we see, that the opinion of President ADDISON was altered, after further discussion on a second argument, and more time for mature deliberation. The case of *Calhoun's Lessee v. Dunning*, also at *Nisi Prius*, tried before SHIPPEN and BRADFORD, Justices, at *Carlisle*, in *May*, 1792, appears, according to the report of it in 4 *Dall.* 120, to have been in direct opposition to *Moorhead's Lessee v. Dixon*. SHIPPEN, J., charged the jury, that "although an award could not give a right to land, yet it would settle a dispute either in an ejectment or an action of trespass, and that it had been so decided in the case of *Fox's Lessee v. Franklin*," of which no report has come to my knowledge, either in print or in manuscript. It is proper, however, to mention, that YEATES, J., in delivering his opinion in *Duer v. Boyd*, 1 *Serg. & Rawle*, 213, said, "that he had seen the notes of Judge SHIPPEN, in *Calhoun's Lessee v. Dunning*, which contained the arguments of the counsel, but not the opinion of the court; and that he was strongly inclined to think that implicit confidence was not to be placed in the accuracy of the report in 4 *Dall.*" It is to be regretted, that Judge YEATES did not ascertain what the opinion of the court really was, because his remarks have thrown a cloud over the case of *Calhoun v. Dunning*, which it is impossible now to dispel. The only instance in which the efficacy of an award respecting the title to land, has been brought directly before the court sitting in bank, was in the case of *Duer v. Boyd, &c.*, 1 *Serg. & Rawle*, 201. It was there decided, that an award made under a rule of court, entered in an action of ejectment, under the act of 1705, was not conclusive, but had just the same weight as a verdict in an ejectment. The reason of that decision was, that the act of 1705 gives to the award the same efficacy as if it were a verdict, and judgment is entered on it as on a verdict. It could therefore have no greater weight than a verdict in ejectment, which certainly is not conclusive. When a rule of reference is entered in an ejectment, under the act of 1705, it must be presumed that both parties know the law, and therefore could not have intended that the award should have a greater effect than a verdict. That was my opinion in *Duer v. Boyd*, but I expressly avoided committing myself as to the effect of an award at common law. These are all the *Pennsylvania* authorities, and I consider them as leaving undecided the question now before us; which is, whether an award of arbitrators, under a submission at common law, fixing a boundary line between the parties, be, or be not conclusive. Feeling myself at liberty to exercise my own judgment, I am of opinion, for the reasons before given, that the award is conclusive. There was error, therefore, in the charge of the court, for which the judgment is to be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[PHILADELPHIA, MARCH 30, 1827.]

BUSHEL and another against The Commonwealth Insurance Company.

A foreign attachment lies against a corporation, incorporated by the laws of another state.

THE plaintiffs, *John Bushel* and *William Seaward*, issued a foreign attachment against the Commonwealth Insurance Company of *Boston, Massachusetts*, and attached certain property belonging to them, in the hands of *Ralston* and *Lyman*, as garnishees. A rule was obtained on the plaintiffs, to show their cause of action, and why the attachment should not be dissolved, on the ground that it had been issued against a foreign corporation.

Chew, for the plaintiffs, showed cause. The question is, whether the property of a foreign corporation can be attached. The act of assembly grants writs of attachment against "*persons*," and corporations are persons. *Wood's Inst.* 2 *Domat*, 454. 1 *Bl. Com.* 467, 468, 475. The only objection is, that they cannot be delivered on bail, and this we deny: and, even if it were so, this by no means decides the question.

1. A corporation may give "bail to the action," as required by the act. In other acts of assembly, bail to the action is to be without the incident of surrender. *Act of the 22d of March, 1807. Purd. Dig.* 122. 9 *Serg. & Rawle*, 228. In all cases, the bail to be given by a corporation is to be absolute. *Cro. Eliz.* 776 *Impey*, 90. Bail does not necessarily import delivery. 2 *Att. Prac. K. R.* 505. *Reeves' Hist.* 114, 121. *Glanville*, b. 1, c. 12, s. 13. 1 *Mod.* 236. The act of 1817, is declaratory of the common law. *Serg. on Attachment*, 62. It lies in *England*, 1 *Mod.* 212. In several instances, acts of assembly speak of special bail and bail to the action as distinguishable.

2. But if bail includes surrender, still corporations are not exempt. 10 *Mass.* 400. Want of precedent is a slender argument against remedies respecting corporations at the present day. Without this you cannot get at land of corporation lying here. The law of corporations is peculiar in *Pennsylvania*, 3 *Serg. & Rawle*, 125. In *Carpenter v. The Delaware Insurance Company*, 2 *Binn.* 268, a strong conclusion is drawn in favour of my argument. The corporation there stood in the same dilemma, the act requiring special bail, and that circumstance did not stand in the way of the appeal, and the company had it without special bail. *Grackle v. Notnagle*, 1 *Peters*, 247. The attachment law is remedial, and to be liberally construed. In *England*, the court will permit the money to be deposited in court, in lieu of special bail. In *Chesnut Hill v. Rutter*, 4 *Serg. & Rawle*, 16, trespass

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vi et armis was maintained against a corporation. They have of late received all the attributes of natural persons. *Funk v. Voneida*, 11 *Serg. & Rawle*, 119, the law is to be moulded so as to suit convenience and justice. 7 *Mass.* 169. 7 *Cranch*, 299. 14 *Johns.* 118. 1 *Southard*, 382. Foreign corporations may sue here. 10 *Mass.* 91. 4 *Johns Ch.* 372. *Adams' Rep.* 23. *Bacon's Essay on Universal Justice*, 32. *Aphorism.*

W. Smith, contra. This is the first instance of such an attachment, which is evidence of the construction of the act. A corporation can be sued only within the jurisdiction of the state which created it. But they may sue beyond the limits, because they can do so by attorney. *M'Queen v. Middleton Manufacturing Company*, 16 *Johns.* 5. *Lynch v. Mechanics' Bank*, 13 *Johns.* 127. Process against a corporation must be by summons and *distingas*, and not by attachment. *Purd. Dig.* 38. See *Act of 1705*. Persons to be not *resident* here, which indicates that natural persons were meant. 1 *Yeates*, 279. Proceedings governed by the custom of *London*; and the object is to compel the appearance of an absent debtor by putting in bail. *Carth.* 25, 26. Bail to the action are the words both in *Carthew* and the act of assembly, and this means special bail. *Serg. on Att.* 134, 135. 1 *Sellon*, *P.* 147. 3 *Bl. Com.* 291. *Rules of the Supreme Court, Regula.* 18, it is considered that the bail is *special* bail. 1 *Mod.* 212, *note*. It does not appear the custom of *London* extends to corporations. 2 *Show*, 372. A debt of a corporation is not attachable. An executor is not liable to attachment. It would derange the order of paying debt. *Serg. on Att.* 61. 2 *Dall.* 73. The death of an executor dissolves an attachment. *Funk v. Voneida*, 11 *Serg. & Rawle*, 118, has nothing to do with the question.

Chauncey, on the same side. It never was intended to give a larger remedy against absentees than against residents. 1 *Dall.* 378. The defendant has no day in court till he enters special bail. 2 *Dall.* 73, 74, 97. An executor or administrator are not attachable. Why not say, let him enter an appearance and dissolve the attachment. [Because you may raise up an administrator here to answer the action, which you cannot do in case of a corporation. GIBSON, J.] In no case does attachment lie, where the defendant cannot be held to special bail. The language of the act is exclusively applicable to natural persons,—as much so as the language of the domestic attachment law. Mainprise is not an undertaking for the debt, but to have the party to answer at the day. Mainpernors cannot surrender. But here the act requires bail to the action, which is a quite different thing. *Crompt Pract. Intro.* 57. *Petersdorf's Bail*, 6, 7. There is as much difficulty as to mainprise as to bail, for a corporation cannot be delivered to mainpernors. The legislature used the words in their known legal sense. The act directing the mode of proceeding against corporations relates to domestic ones. 2 *Serg. & Rawle*, 221. This court

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are asked to legislate and provide a remedy not intended by the legislature.

C. J. Ingersoll, in reply. Corporations are formidable. The march of the law has been to break them down by imparting the attributes of natural persons. Technical objections against responsibility, on account of their abstract nature, have melted away before the effect of reason and good sense. Why now apply to the legislature for assistance to provide a remedy? The act of 1817 provides for the case, and includes all corporations foreign and domestic. *Fitch v. Ross*, 4 *Serg. & Rawle*, 563. The common law is not our guide, and not even the custom of *London*. The matter is to be regulated by the act of assembly, and the practice under it. If no precedent, then give the act a liberal construction in advancement of the remedy and redress of the mischief. The whole proceeding is our own. No *scire facias* is mentioned in the act, nor is it found in the custom of *London*. Even in *Carpenter v. The Delaware Insurance Company*, 2 *Binn.*, the court did not stick to the letter of the act, but overthrew it by permitting the defendant to appeal without bail. In *Fitch v. Ross*, *Binney arguendo* said, the object is not to compel an appearance, but to have execution of the goods. *Andrews v. Clarke*, *Carth.* 25, says nothing of special bail,—the act of assembly says nothing of special bail;—but after judgment and execution the defendant may give bail. The *obstacle* here is altogether technical; it ought not to stand in the way of a valuable remedy. *Blackstone* calls bail to the sheriff special bail. 3 *Com.* 290, 291. Bail to the action, he calls bail above. In the civil law, special bail are bound for the debt. 3 *Com.* 291. 1 *Sell. Prac.* 59, *Introd.* 2 *Bro. Civil and Administration Law*, 356, note, 19. *Coke*, 4 *Ins.* 179. There is a distinction between bail and mainprise. Bankruptcy will not dissolve a pending attachment, although the bankrupt is not bound to give bail, and is in this respect exactly like corporations. *Fitch v. Ross*, 4 *Serg. & Rawle*, 564. If the corporation cannot appear on special bail, let them appear on *sci. fa. ad disprobandum debitum*; this is all that they ought to have under any form.

TILGHMAN, C. J., being sick and absent, gave no opinion in this case.

ROGERS, J. The plaintiffs have issued a foreign attachment, and have attached, in the hands of *Ralston* and *Lyman*, as garnishees, certain property belonging to the defendants. On motion, the following rule has been entered. Rule on the plaintiffs to show cause of action, and why the attachment should not be dissolved, on the ground that it has issued against a foreign corporation. Cause of action has been shown by the plaintiffs, so that the single question is, whether a foreign corporation is within the true intent and meaning of the laws regulating attachment, and particularly the act of 1705, entitled an act about attachments. In order to sustain

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the motion, it will be necessary for the defendants to show that they are not embraced by the words and spirit of that act, and in the commencement of the argument, I was immediately struck with the difficulty and confusion which arose from the plaintiffs' being called on to show, that the foreign attachment was in this case properly issued. I felt at a loss to conceive why foreign corporations should be exempt from the beneficial provisions of those laws. The words of the act appeared to be sufficiently comprehensive to embrace them, and they were in my apprehension within the mischief intended to be remedied. Corporations are artificial persons, 10 *Mass. Rep.* 92. They have the power to sue, and be sued, implead, and be impleaded, grant or receive, by their corporate name, *and to do all other acts, as natural persons may.* 1 *Bl. Com.* 475. The power of a corporation to sue a personal action is not restricted to corporations created by the laws of the commonwealth. 10 *Mass. Rep.* 91.

It is difficult to conceive, that if corporations are artificial persons,—if they can do all acts that natural persons may,—if they can sue within a foreign jurisdiction, why they should not also be liable to suit, in the same manner, and under the same regulations as domestic corporations. The reason why they have not been, in point of fact, more frequently sued, is given by Chief Justice SPENCER, in 16 *Johns.* 7.

The process against a corporation, by the common law, must be served on its head or principal officer, within the jurisdiction of the sovereignty, where this artificial body exists. If the president of a bank of another state were to come within this state, he would not represent the corporation here: his functions and his character would not accompany him, when he moved beyond the jurisdiction of the government under whose laws he derived his character. That this would be the case, when he was within the state on business unconnected with the corporation, there can be no question; but where a corporation locates the president, or other officer within the state, for the express purpose of making contracts here, whether process served on him, would not be sufficient, is a question which I shall not undertake to determine, because it does not necessarily arise. There is nothing, then, in the nature of a corporation to exempt it from suit. The difficulty arises from there being no person within the limits of the state on whom you can serve your process.

With the multiplication of corporations, which has and is taking place to an almost indefinite extent, there has been a corresponding change in the law in relation to them. There was a time, when it was supposed that no suit could be sustained against them, unless upon an express contract, under the seal of the corporation. It is now held, that they are liable in trespass, and in case, upon an implied contract. 7 *Mass.* 169. 7 *Cranch*, 299. 4 *Serg. & Rawle*, 16. 14 *Johns.* 118. This change in the law has arisen from a

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change of circumstances, from that silent legislation by the people themselves, which is continually going on in a country such as ours, the more wholesome, because it is gradual, and wisely adapted to the peculiar situation, wants, and habits of our citizens.

The motion to dissolve the attachment, is made on the ground that the defendant is a foreign corporation, and, as such, is not within the act of 1705, nor liable to attachment by the custom of *London*. The effect of sustaining the motion, will be to deny the plaintiffs, citizens of *Pennsylvania*, all remedy in this state, on a contract made here, and to deprive them of a special lien on the goods attached. It will be for the defendants, then, to show most clearly, that foreign corporations do not come within the intention of the laws regulating attachments.

When we consider the number of corporations which now exist, their continual increase, the extent of their operations, the establishment of agents within this state for the express purpose of making contracts here, it is difficult to conceive a valid reason why they should be exempted from the operation of laws, which regulate the contracts of individuals and domestic corporations. They are not such favourites in courts of justice, as to claim an exemption on that ground.

The reason of the passage of the act of 1705, is set forth in the preamble to be, "That the laws of this government have hitherto been deficient in respect of attachments, so that the effects of persons absenting are not equally liable with those of persons dwelling upon the spot, to make restitution for debts contracted or owing within this province, to the great injury of the inhabitants thereof, and the encouragement of such unworthy persons, as frequently by absconding, make advantage of the defect aforesaid."

In the third section, "provided always, that no writ of attachment shall hereafter be granted against any person or persons' effects, but such only as at the time of granting such writs are not resident or residing within this province, or are about to remain or make their escape out of the same, and shall refuse to give sufficient security to the complainant for his debt, or other demand, before he depart the said province."

It cannot, I think, be reasonably doubted that corporations are within the words of the act. When the word *person* is used in a statute, corporations as well as individuals are included. As, where the inhabitants of a town are bound to repair a bridge, or to pay taxes, corporations, as well as individuals, are liable. 2 *Inst.* 697, 703. *Cowp.* 83. 5 *Cranch*, 61.

Are foreign corporations within the spirit of the act? We are so to construe the act, as to suppress the mischief and advance the remedy. The mischief which the legislature intended to remedy was, that the effects of persons, artificial or natural, who were *absent*, were not equally liable with those of persons, artificial or natural, dwelling upon the spot, to make restitution for debts con-

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tracted, or owing within the province. Foreign corporations and foreign individuals were placed on a better footing before the passage of the act, than domestic corporations or citizens of the state; for remedy whereof, the act in question was passed, enabling the court to compel an appearance by attachment of their effects within the state.

It may be here proper to remark, that the act has been already construed to extend to persons, who have never been within the state, it has therefore the same application to corporations which are stationary, as to natural persons. Foreign corporations, it is true, are necessarily absent from the state, but may have effects within it, and may contract and owe debts to citizens of this state, which they may be unable or unwilling to pay.

It is no answer to say, that this is a mere question of remedy; that the corporation may be sued in *Massachusetts*, as in this case, or in *Europe* or *Canton*, as the case may be.

But suppose suit should be commenced within a foreign jurisdiction, judgment obtained, and execution issued, and the company should prove insolvent, (and daily experience shows us that this is no improbable supposition,) what would be the remedy against their effects within this state? Relief must depend entirely on the laws of the foreign government. If there was a power in their courts to compel an assignment, or to sequester their property, in and out of the state, there might be some remedy, however inadequate, to the creditor. I cannot bring myself to believe, that the legislature ever intended that citizens of *Pennsylvania*, who had the property within their grasp, or a lien upon it, should be deprived of that lien, and depend for the payment of their debts on the laws of a sister state, or of a foreign government, and the more especially am I unwilling to adopt that construction at this time, when this contract was made, and contracts are daily making by foreign corporations, within the limits of this state, and under the jurisdiction of this court. If this were a case of doubtful construction, the argument *ab inconvenienti*, would be exceedingly strong, and would go far with me, in the determination of the case.

But it is said that corporations are not within the act, because it is provided, "That if the plaintiff in the attachment obtain a verdict, judgment, and execution, for the money and goods, in the garnishee's possession, yet the defendant in the attachment may, at any time before the money be paid, *put in bail to the plaintiff's action*, upon which the attachment is grounded, whereby the garnishee will and shall be immediately discharged."

Granting, merely for the sake of the argument, that "*bail to the plaintiff's action*," as used in the act of assembly, means special bail only, and agreeing, as I certainly do, that a corporation cannot enter special bail, yet it by means follows that the effects of foreign corporations cannot be attached, under the act of 1705.

This point has undergone a judicial investigation, in the case of

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Carpentier v. The Delaware Insurance Company, 2 Binn. 264. It was there contended, that the plaintiff could not enter a rule of reference, because the defendants were a corporation. That in every case intended to be referred, an appeal was given; but that in no case could it be obtained by the defendant, without entering into a recognizance conditioned to pay the debt and costs, or to surrender him to jail. That a corporation could not give such a recognizance, because it could not be surrendered.

From this it was inferred, that corporations defendants were not within the act, in the same manner, and by the same arguments as it is here contended that corporations are not within the act of 1705, because bail to the plaintiff's action, means special bail, and that they cannot enter such bail. The court, however, decided that the plaintiffs were not prevented from entering a rule of reference, which in effect decided the principal point in this case. If bodies corporate, say the court, are not within the law, it must be because there is something in their nature inconsistent with its provisions; for they are *not expressly excepted*. It is contended, they must be excepted by implication, because they are excluded from the benefit of an appeal, which is given on condition incompatible with the nature of a corporation. It is clear, says the Chief Justice, that one of the alternatives of this condition is not applicable to a corporation, which is not a natural, but political body, incapable of being surrendered or imprisoned. I agree that the form of the recognizance is not applicable to a body corporate, but from this I draw a different conclusion from them. I do not infer that the defendant can have no appeal, but that they may have an appeal without entering into any recognizance.

In this case, I do not infer that the effects of foreign corporations cannot be attached, but should infer, were it not for considerations which I shall state, that the attachment should be dissolved by entering an appearance without bail.

In *Pennsylvania*, a foreign attachment will not lie against an executor, as defendant, for a debt due from the testator; though the custom of *London* seems different. 1 *Serg. on Attachment*, 61. 2 *Dall*.

It will not lie in *Pennsylvania*, because it would interfere with the order prescribed for the payment of debts. This is not a consideration in *England*, the executor having full power over the assets of the deceased, their laws differing in that respect from ours. Heirs, executors, and administrators cannot be arrested and held to bail, the demand being not on the person, but the assets of the deceased. 1 *Sell. P.* 45. Although they cannot be held to special bail, yet it appears that by the custom of *London*, a foreign attachment will not lie against the executors, as defendants, for a debt due from the testator. 1 *Serg. & Rawle*, 61.

The case of *Fitch v. Ross*, 4 *Serg. & Rawle*, 564, decides.— That the death of the defendant, in a foreign attachment, after

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final judgment, does not dissolve the attachment; and yet, in the language of the counsel, the appearance of *Ross*, by entering special bail, was rendered impossible by a superior power.

I cite these cases for the inference which necessarily arises, that neither the issuing of a foreign attachment, nor its dissolution, depend upon the ability of the defendant in the attachment to enter special bail.

Taking the point as now settled, that foreign corporations are liable to a foreign attachment, the next question which claims the attention of the court is, the manner in which the attachment may be dissolved. As a matter of practice, and one about which a difference of opinion may exist, it is better that it should be put at rest.

In my view of this case, it is a consideration of some weight, that the object of the laws regulating attachments, is merely to compel an appearance by the debtor. 1 *Serg. on Att.* 1. *Carth.* 26. 4 *Serg. & Rawle*, 564.

“Foreign attachments,” says Justice DUNCAN, in the case of *Fitch v. Ross*, 4 *Serg. & Rawle*, 564, is a “peculiar process to compel the appearance of the non-resident debtor, by distress and sale of the property attached.” By the attachment, the creditor obtains a special lien on the effects of the absent debtor, of which he can only be deprived by the appearance of the debtor, which is the great object of the act. When a foreign corporation or debtor enters an appearance to the action, they are placed upon the same and no worse footing than a resident debtor. They submit themselves to the jurisdiction of the courts of this state, in which the merits of their cause, will be fairly examined.

The motion to dissolve is to relieve the defendants from the effects of the lien, and it would be unreasonable to do so, without giving the plaintiffs adequate security. If the bail to the action, in the act, means special bail only, then the only remedy for the corporation would be by *scire facias ad disprobandum debitum*, on the 4th section of the act. This, however, in some cases, would not be an adequate relief, and would not be such a fair and equitable construction of the act as we are bound to give.

As a foreign corporation cannot from their nature give the plaintiff *security by the body*, the highest security known to the law, 4 *Serg. & Rawle*, 564, it is but reasonable that the security should be dissolved, upon their giving the next best security, which is security for the debt, which may be found to be due, together with the costs of suit.

Although the terms used in the act,—“bail to the plaintiff’s action,”—ordinarily mean special bail, yet am I so disposed equitably to construe the act, as to suit the nature of the corporation, which seeks the dissolution of the attachment.

The putting in special bail, is one of the modes of dissolving an attachment, yet it is not the only mode, nor is it so expressed or

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intended in the act. The legislature, say the defendant, *may* dissolve the attachment, by bail to the plaintiff's action.

The court will inquire into the justice and extent of the plaintiff's demand, and if no sufficient cause of action be shown, they will discharge the property altogether. 1 *Dall.* 154. An attachment will be dissolved, where the defendant was not an object of the foreign attachment laws. 1 *Dall.* 152. Or where the property was not liable to a former attachment. 1 *Dall.* 354. 2 *Dal.* 73. Or where the court had not jurisdiction. So, under the custom of *London*, an attachment will be dissolved where the defendant surrenders himself. 1 *Com. Dig.* 154.

These cases show the latitude of construction adopted by the courts, in relation to the laws regulating attachments. In my view of this case, the construction which the court have given the act is altogether in favour of the defendant, enabling him to repossess himself of the property, upon doing common justice to the plaintiff; enabling him to have his claim examined by a court competent in all respects to do exact and equal justice to all the parties.

The ground upon which the Chief Justice in the case of *Carpentier v. The Delaware Insurance Company*, gave the appeal to the corporation without bail, was, that the appeal was to be construed liberally, because it is in support of the constitution, which secures the trial by jury. This reason not applying to this case, we are of the opinion that the defendants take nothing by their motion, but that upon their giving bail for the payment of the debt, interest and costs, on the affirmance of the judgment against the corporation, the court will permit the defendants to appear, and on motion will dissolve the attachment.

The corporation cannot appear except by leave of the court. In *Carth.* 26, it was agreed by all that a foreign attachment in *London*, is to no purpose but to compel an appearance of the defendant in the action; for if he appear within a year and a day, and put in bail to the action, the garnishee is discharged, but without bail, they will not compel an appearance.

DUNCAN, J. This is a rule to show cause why the foreign attachment issued in this case ought not to be dissolved. It is quite clear, that if it is not authorized by law, and ought not to have issued, the court on motion is bound to dissolve or quash it; and it is equally clear, that if this be a corporation of the state, foreign attachment would not lie: so that the true question is, does a foreign attachment, by the laws of *Pennsylvania*, lie against a foreign corporation, which by attaching their effects can compel them to appear, in order to dissolve it, by entering special bail. I do not think it a question of such great magnitude as has been represented, or that such mighty mischiefs will arise from deciding that the effects of a corporation created by a sister state cannot be attached. Inconvenient it may be to the party entering into a

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contract with a foreign corporation to be obliged to apply to the forum of another state for justice; but the man who contracts with a foreign corporation takes his risk of that, and judges for himself whether that inconvenience is or is not counterbalanced by the lesser premium, and contracts according as in his judgment the scales of advantage or inconvenience preponderate. I mention this, not because I think the courts ought to be governed by considerations of this kind, where a law is plain and the uniform construction has prevailed for more than a century. If the evil of dealing with those corporations, from the impossibility of bringing them before our forum, be such as is represented, (and I am far from denying that it is a great inconvenience,) the legislature alone can cure it. It is beyond the powers of courts of justice to grant relief, unless such relief is authorized by the laws of the land. The legislature is now in session, and if the evil calls so loudly for redress, let the legislature give it, but not us,—whose province it is to decide on the interpretation of laws,—make them as we go along, put them on the judicial anvil, and with the judicial hammer give them a different shape, and fashion them according to our own notions of right and wrong. I observe, by the papers of this morning, that the whole subject is before the legislature, and a bill read in the senate concerning agreements of insurance companies, not authorized by the laws of the state: let us not anticipate them.

This question is to be decided exclusively on our own statutes. The foreign attachment, though partly borrowed from the custom of *London*, is not a process known to the common law,—is not a process by which, according to that law, corporate bodies can be brought into their courts; and I think it was put fairly by the counsel of the plaintiffs, on the only plausible ground,—the enactments of our own state. The process of foreign attachment is founded on the act of 1705, a law passed in the infancy of the colony, when corporations and monied institutions were unknown in the whole of the *American* provinces. The provisions of the act were therefore not intended for those creatures of the law, invisible, intangible, incorporeal and imaginary, but for natural persons, with whom in their natural character the primitive people of the colony, had dealings. But if I could find any terms in the act, or if by any, the most liberal construction, I could so extend the act as to draw these creatures of the law within its provisions, I would willingly do so, for I acknowledge the inconvenience. But as in my conscience I do not think this within the view of the legislature, and as I think it inconsistent with the whole letter and structure of the act, I cannot alter the law, or mould it anew to meet the emergency.

The foreign attachment was intended to compel bail to be put in by an absent debtor, by impounding the property, if found within the jurisdiction. It is not special bail, because bail to the action

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is special bail; nor common bail, for that would be nugatory. It is not bail for the debt. The declared object of the law, was to make persons absenting themselves equally liable with those residing in the state. It is not security pledges for the return of the goods, as in replevin, nor stipulation in the admiralty courts, but bail to the action, which is known to every language, and every lay man, to be special bail by recognizance for the surrender of the body of the defendant. The practice has always been in conformity to this. The attorney indorses, as he does on the *capias*—take bail in such a sum, and this very writ is so endorsed bail in four thousand dollars. It was not so first stated by me, in *Fitch and another v. Ross*, “that it was a peculiar process to compel the appearance of non-resident debtors, by the entry of special bail;” for the law had always been so laid down. Inquiry into the cause of action was always made by the court, exactly as on a *capias*. 1 *Dall.* 154. *Id.* 218. And, in the note to the first case, it is said, in attachment the defendant being absent cannot enter a common appearance, or give a warrant of attorney for that purpose: therefore the court cannot direct common appearance, as in a *capias*, but must dissolve the attachment, if no cause of special bail be shown. And, in 1 *Dall.* 375, President SHIPPEN, better acquainted with the practice in foreign attachments than any man living, says, “The attachment law, and all proceedings under it, suppose the defendant to be an absent person, and he has no day in court until he enters special bail, and thereby dissolves the action; or comes in afterwards, when the money is recovered from the garnishee to dissolve the debt, which is done by *scire facias ad disprobandum debitum*. In either of which cases, he puts the plaintiff upon his legal proof of the demand, and is admitted to make full defence.” It does not therefore accord with legal ideas, that he should have the opportunity of trying the cause on the writ of inquiry, and also another opportunity of trying or entering special bail. And, by the present Chief Justice, (in 2 *Serg. & Rawle*, 224,) it was said the attachment transfers no property to the plaintiff: its object is to compel the appearance of the defendant: that being attained by the entry of special bail, the attachment is dissolved. So likewise, he says, the attachment would be dissolved by *the death of defendant before judgment*, though no bail was entered: so that there is nothing of novelty in the opinion in *Fitch v. Ross*. It was a statement of the principles settled by decisions on the law of attachment. The lien by attachment continues until the entry of special bail. The action is a bailable writ: nothing but special bail can dissolve it, and it can always be dissolved on special bail. When the bail is given, it proceeds as a personal action by *capias ad satisfaciendum* against principal, and *scire facias* against special bail. 1 *Dall.* 248. There is no special *feri facias* to be laid on the goods attached; this is unknown to the law, where the defend-

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ant appears and enters special bail. Thus the plaintiff obtains all that the law intended—security of the body of the absent debtor. A foreign attachment until special bail is entered, and an appearance, is a proceeding in rem, and is not extended further than the property attached. Where special bail is entered it is a personal action. 1 *Dall.* 265. It is agreed by all, that a corporation cannot be held to special bail: it cannot be arrested by its artificial, intangible, imaginary body: the sheriff cannot lay his hands on it: it cannot be committed, or be delivered to the bail on a string, which when he pleases he can draw in: it cannot be surrendered to prison: it is not entitled to the benefit of the bread law: it cannot be discharged under the insolvent laws, nor be a bankrupt. The entry of special bail is an appearance in person. Now, it is a maxim of law, that a corporation cannot appear in court, but by attorney, because if the members appear, (for the corporation cannot appear in court, being invisible,) the court cannot judge whether all the members appear. A suit against a corporation is always by original out of chancery. The plaintiff cannot proceed by bill, nor declare against the corporation, as in the custody of the marshall. A corporation cannot be essoigned, because an essoign is in excuse of the personal appearance of the party. Quotation from ancient authorities would be tedious. I therefore refer, for the learning on this subject, to 1 *Kyd on Corp.* 270. In proceeding against corporations, the process is served on the head officer of the corporation; and, if the defendants do not appear by attorney, the next process is by *distringas*, and the sheriff may distrain the land and goods which constitute the stock of the corporation; and, if they have nothing in land or goods, there is no way to compel them to appear, either in law or equity. If they have, the plaintiff may compel them by distress infinite until he has raised his debt from the issues. Small issues are at first made, but, if the corporation persist, they are renewed until the whole demand is satisfied. Summons personally served, the attachment of goods, and the distress infinite, is the only method of proceeding against corporations 1 *Tid's Prac.* 107 to 116. There is, in my humble judgment, demonstration in the act of 1705, and every line of it, that natural persons were alone intended and alone comprehended; for if corporations had been intended, why not some other provision for appearing and dissolving that, than requiring that which they could not give, and which would not be received—special bail. The entry of the bail is the only condition on which the absent debtor can bring himself into court, or obtain a *status in curia* in order to defend the action. It is true he may have, after his goods are sold, the *scire facias ad disprobandum debitum*; but though he should succeed, his property during all that intervening time is locked up, and if it be a debt attached, he loses the interest during the pendency of action. The legislature intended to give to all debtors whom they subjected to

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the foreign attachment, the right to dissolve it on entering special bail. No other condition can be imposed by the court: no other bail can be taken. It would seem to follow as a necessary consequence, that the debtor who could not give special bail, because it would not be taken, was not the subject of it. The debtor corporation is not such an entity as can enter special bail: it cannot be arrested, because it is invisible: it cannot be delivered in bail, because it cannot be in custody or surrendered. All whose effects are attached can dissolve it by entry of special bail. All who can appear in person and give security for the forthcoming of their bodies, are the subjects, and the only subjects of foreign attachment. The case put of a feme sole trader, who cannot be arrested, is foreign to the purpose: if she contract debts in another state, and her person be found within the jurisdiction, she may be arrested, or her goods may be attached. The case, in my view of it, only requires this simple exposition. It is needless to inquire into the custom of *London*; but, if we did, we find that the goods of a corporation cannot be attached by foreign attachment: it is not within the custom. The action is against a corporation aggregately, in its corporate character: such corporation is certainly not a person: a person who could be arrested, if found within the jurisdiction,—a person subject to *capias* and imprisonment. It can neither be manually arrested, (and a manual arrest is the only legal one,) nor committed, nor discharged on bail. The case of *M'Quin v. The Middleton Manufacturing Company*, (16 *Johns.* 5,) is this case in terms. The framers of the *New York* law had the same object in view as our legislature of 1705. Its enactments, so far as respects the subjects of the act, are substantially in the same words; and it was there held, that the legislature contemplated the case of a liability to arrest, but for the circumstance that the defendant was out of the jurisdiction of the court, and that the act, in all its provisions, meant only that the attachment should go against natural not artificial or mere legal entities. The first section speaks of persons, and throughout the act only natural persons were intended. It is not now necessary to decide whether a corporation can be sued out of the jurisdiction of the state which created it. I think the reasons of Chief Justice SPENCER are very strong, that the process must be served on the head or principal officer of the corporation within the jurisdiction of the sovereignty where this artificial body exists. The act of 1817 shows this to be the view which the legislature took of the matter, and proves that the property of a corporation cannot be seized by a foreign attachment: it changes the whole mode of proceeding against corporations: its substitution, summons, is more simple and expeditious than the perplexed and intricate one by summons and distress, the only remedy then known. It gives a summons, but requires a personal service on the president or other principal officer of the institution. That is the process, but it is personal, and must be served person-

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ally on certain designated officers of the corporation. It is a personal action *ab initio*, and not a proceeding in *rem*. It does not give a process on which bail can be demanded or goods attached, to compel a party absent, and which cannot personally be served within the jurisdiction, to give bail to the action. And what conclusively proves that foreign corporations, whose head might accidentally be found within the jurisdiction, are not the subject of the law, is the provision for execution; that is, "That any execution so issued and directed to the sheriff, shall be served by the officer going to the banking-house, or other principal office of the corporation, at the usual office hours, and demanding of the president, or chief officer, cashier, treasurer, secretary, or chief clerk of the corporation, the amount of the execution, if the officer can be found; and if the same is not forthwith paid, then the sheriff or other officer is authorized to levy on any personal property, &c. of the corporation." The provision for execution shows what corporations were contemplated by the legislature. The act does not look to a foreign corporation, but to one whose house of business is within the jurisdiction. It is intended for our home-made corporations, of which *Pennsylvania* is an extensive manufacturer, and not for exotic plants, articles of foreign origin and growth. But if it related to other corporations than those located within our own border, the commencement of this action must be by personal summons and personal service; for there can be no outlawry of a corporation. This proceeding against other than natural bodies, is as unwarranted by acts of assembly as it is unauthorized by the common law; and I cannot bend the laws to satisfy public convenience and still public clamour, if such there be; nor modify its provisions, or coin a new course of proceeding, to meet an exigency not provided for.

The arguments of the counsel of the plaintiffs, addressed to the legislature, might be very convincing to show that the altered state of society required an alteration of the law; but these are not topics properly addressed to a judicial tribunal, whose province is the interpretation of the laws, here the written laws, the *lex scripta*.

There was an instance put by the counsel, and put with force,—the case of a feme sole trader, exempt from distress by our laws; but it is readily answered: if she enters into a contract in another state, and can be found there, she is liable to arrest; and if she cannot be found, and there is such law as our foreign attachment law, her goods found within the jurisdiction might be attached.

If this process does not lie, the plaintiffs have the right to call for its dissolution, and no terms can be exacted from them by the court not prescribed by the law. What is this court to do? We must either dissolve the attachment, quash it, as having issued irregularly against a party not subject to it, or require special bail for the surrender, not of the members of the corporation, but of the

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body politic, or exact a stipulation unknown, take a recognizance unknown for the return of the goods: for such recognizance stipulatory is unknown in our law, and certainly is any thing else than bail to the action. When the act of 1817 passed, it was not imagined that courts of justice could change the established course of proceeding on account of any inconvenience. And if it be so, that to change it is a matter of judicial discretion, or inherent power of the court, where is this to end? It may be exercised by the most inferior jurisdiction, by a justice of the peace, who by this act is authorized to proceed against corporations. This, in every view which I can take of the question, would not be the interpretation of existing laws, which is one province of this court, but making laws, which is a power exclusively vested by the constitution in the legislature. This power I dare not exercise. Would the counsel of the plaintiffs expect this from us, and admonish us against waiting for legislative interference? But my Brothers' views of this subject differ from mine, and considering it a case provided for by our statute law, have come to a different conclusion; and, if it is, their conclusion is a just one and my opinion erroneous. Though I differ from them with all respect, and ought to distrust myself, yet when my opinion is so fixed as it is on the construction of these laws, I must be governed by it, and decide according to the dictates of my own reason and judgment.

I am of opinion that the motion should be granted, and the writ quashed or dissolved.

Rule discharged.

[PHILADELPHIA, MARCH, 1827.]

SALTER *against* HOWELL.

CASE STATED.

Testator left four thousand dollars "to my daughter M. B., to be placed out at interest upon good security by my executors, and the interest to be paid to her annually or oftener, as they shall receive the same during her life, and at her decease she may will it to any of my daughter's children as she pleases or sees fit; and, in default of her making a will and so disposing of it, it is my will that the same shall be divided amongst her sister's children, share and share alike." In another clause, she bequeathed the interest of a like sum to the two sons of a deceased daughter, with cross-remainders to their issue, and she had then a daughter M. H., who had several children: M. B. afterwards made her will, and meaning to execute the power, gave one thousand dollars thereof to her great niece, E. S., and the remaining three thousand to her sister, M. H., if she should survive her, if not, then to her eldest son, S. E. H.

Held, 1. That the power was not well executed by M. B., either as to the one thousand dollars or three thousand dollars.

2. That in that event the whole money went to the children of M. H., and no part to the children of the deceased daughter.

THE following case was stated for the opinion of the court:

Ann Emlen, by her will, dated the 27th of *June*, 1815, proved the 10th of *February*, 1816, made the following bequests:—

"I leave four thousand dollars to my daughter, *Mary Beveridge*, to be placed out at interest upon good security by my executors, and the interest to be paid to her annually, or oftener, as they shall receive the same during her life; and at her decease, she may will it to any of my daughter's children as she pleases or sees fit; and in default of her making a will and so disposing of it, it is my will that the same shall be divided amongst her sister's children, share and share alike.

"*Item*. I give and bequeath to my executors, and the survivor of them, and the executors and administrators of such survivor, the sum of four thousand dollars, in trust that the same be placed out at interest upon good security, and the interest that may arise thereon to be paid over from time to time, as they shall receive the same, to my deceased daughter, *Ann Mifflin's* two sons, *Samuel* and *Lemuel*, in equal shares, during their natural lives, and if either of them shall die leaving lawful issue, then I give an equal moiety, or one half part of the said principal and interest monies to such issue, if more than one, equally to be divided between them: but if either of them shall die without leaving lawful issue, then the whole of the said interest (only) to be paid to the survivor of them during the life of such survivor. And, upon the decease of both of them, the said *Samuel* and *Lemuel*, if either of them shall leave lawful issue, such issue shall take the whole of the said monies, if more than one person, in equal shares. But in

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case both of them die without leaving lawful issue, then I give the the same, both principal and interest, to my daughter *Mary Howell's* children, to be equally divided between them, share and share alike.

"*Item.* I give to my executors forty dollars in trust, to pay the treasurer of the monthly meeting.

"*Item.* Furniture to go into rest and residue, &c.

"*Item.* Residue to *Mary Howell*, in fee.

"*Item.* I have made the foregoing disposition of my estate without leaving any part thereof to my sons' children, because my sons received a much larger proportion than my daughters of their father's estate, and I wish to make up the deficiency."

Lastly, she nominated *Samuel E. Howell* and Dr. *Samuel Emlen*, executors, &c.

Mary Beveridge died the 20th of *September*, 1820. Her will was dated the 16th of *September*, 1820, and was as follows:—"As to the principal sum of four thousand dollars, the income of which my late mother, *Ann Emlen*, by her will, left to me during my lifetime, with power to dispose of the principal by my will, I do in performance and execution of that power give and bequeath one thousand dollars thereof to my great niece, *Elizabeth Smith*; and as to the remaining three thousand dollars residue of the said principal sum of four thousand dollars, I do give and bequeath the same to my sister, *Margaret Howell*, if she shall survive me; but if she shall not survive me, then I give the same to her eldest son, *Samuel E. Howell*."

Ann Emlen left two daughters—the above-named *Mary Beveridge* and *Mary Howell*. A third daughter, *Ann Mifflin*, died before her, on the 22d of *March*, 1815, leaving issue, *Samuel*, who died *July*, 1819, and *Lemuel*, who died *August*, 1824, both without issue. *Mary Beveridge* never had children. *Margaret Howell* survived her, and died the 4th of *May*, 1822.

At the time of the death of her mother, (*Ann Emlen*.) *Margaret Howell* had eleven children living, viz:—*Samuel E.*; *George*; *Mary*, wife of *Benjamin Jones*; *Margaret*, wife of *John Salter*, the plaintiff; *Hannah*, wife of Dr. *Burton*; *Eliza*, wife of Dr. *Warner*; *Susan*, wife of *A. Fenwick*; *William E.*; *Joseph E.*; *Jane*, and *Emmeline*, (now living,) and four grandchildren, the issue of another daughter, *Ann Smith*, who died several years before *Ann Emlen*.

Joseph E. Howell, and *William E. Howell*, both died before their mother, (the said *Margaret Howell*:) the former the 20th of *March*, 1819; the latter, the 27th of *February*, 1822; leaving issue now living.

Susan Fenwick is also deceased, having issue now living.

The question for decision is, whether the plaintiffs are entitled to any; and, if any, and what part of the said legacy of four thousand dollars.

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1. Is the bequest in Mrs. *Beveridge's* will a good execution of the power as to the disposition of the four thousand dollars?

If not, that sum is to be divided among Mrs. *Beveridge's* sister's children. Then,—

2. Who are these children? Do they include the children of *Ann Mifflin*, who was not living when *Ann Emlen's* will was made?

3. Children of *Ann Smith*, (daughter of *Margaret Howell*), who died seven years before *Ann Emlen*, are they entitled?

4. Representatives of *Joseph E. Howell* and *William E. Howell*, who survived *Ann Emlen*, but died before the mother, *Margaret Howell*, do they take the shares which they (the decedents,) would respectively have taken, had they survived their mother?

The case was argued by *Tilghman* and *T. Sergeant*, for the plaintiff, and *W. Smith*, contra.

The opinion of the court was delivered by

DUNCAN, J. Two questions arise on the will of this testatrix:—The first is, was the power given to *Mary Beveridge* well executed? If it was not, then who on its non-execution are entitled to take, according to the provisions of the will?

The apportionment of three thousand dollars of the fund to *Margaret Howell*, if she survived *Mary Beveridge*, is clearly void. There is a strictness required in the execution of powers which frequently appears to be harsh; but if once a latitude was allowed, and the direction of the testator as to the appointment was departed from, there would be no rule to go by; and if an implied or presumed intention, even in hard cases, was permitted, and the broad rule of strict adherence to be broken in upon by a minute inquiry into the circumstances of families, it would be highly mischievous, and render the judge the distributor of favours, instead of deciding on the words of the testator, or his clear and declared intention. A power to appoint to the children of A. will not therefore authorize an appointment to the mother, whom the testator had passed by. The appointment to *Mary Howell* is therefore invalid. This likewise defeats the appointment to *Samuel E. Howell* in contingency; and here, where the contingency did not happen, he cannot take. It is given on a contingency, on which *Mary Beveridge* had no right to give it. The appointment of one thousand dollars to *Eliza Smith*, a grandchild of *Margaret Howell*, cannot be supported; for it is now well settled, that a power to appoint to children is not well executed by an appointment to grandchildren. *Sugden on Powers*, 501. If, indeed, this power could not otherwise be executed, or if there were no children, then it might be valid, because the intention would be manifest to show that by children the testator meant grandchildren; the power not being well executed.

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The next question is, what children, whose children, (the children of a daughter of the devisor, and the sister of *Mary Beveridge*, being the only objects,) are within the scope of the power, and within the distinction, in case of non-execution of the power; and here the intention of the testatrix is to govern: and, taking into consideration every provision of the will, that intention is very apparent. The testatrix's plan was to put all on a footing: there should be an equality among her children and grandchildren, and her design was, to put the children of her daughter on a footing with her son's children, and the children of her deceased daughter, *Anne Mifflin*. She states that her son had received of his father's estate a much larger portion than her daughters, and therefore she leaves his children nothing. To the two sons of her deceased daughter, *Ann Mifflin*, she gives four thousand dollars; providing, that if both of them should die without leaving issue, it should go over to her daughter, *Margaret Howell's* children; and to *Mary Beveridge*, which is the devise in question, she gives the interest of four thousand dollars annually during her life:— And, at her decease, she may will it to any of her daughters' children, as she pleases and sees fit; and, in default of her making a will, and so disposing of it, then it is to be divided among her sister's children, share and share alike. What sister did she intend? the only living sister of *Mary Beveridge*. She might appoint to any one of them. Now the executor of that power could not give it to the child of any deceased sister. Those children of *Margaret Howell* were otherwise unprovided for, and appear to have been the particular objects of the testator's bounty, and of her justice in the distribution of her property, all others being provided for.

If *Mary Beveridge* did not so appoint, then it was to be divided among all *Margaret Howell's* children, share and share alike. When she speaks of her daughter, *Ann Mifflin*, she calls her her deceased daughter; when of *Margaret Howell*, she calls her her daughter,—“my daughter, my daughter's children;” and when she speaks of them in relation to Mrs. *Beveridge*, it is her daughter's children. It is not a power to give to the children of “any one of my daughters,” but “to any one of my daughter's children,” her whom before she had described as her daughter; that is, she may select any one of my said daughter's children, not any child of any of any of my daughters. This may at first appear ambiguous, but a careful attention to the whole structure of the will, and the phraseology of the testatrix, will satisfy the mind that this bounty was intended for the children of her living daughter, *Margaret*, the children of the living sister of *Mary Beveridge*. That she never intended the children of her deceased daughter, *Ann Mifflin*, because for these children she had made the same exact provision, and her son's children were to get nothing, in any event. On the death of *Ann Mifflin's* children, without leav-

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ing issue, the children of *Margaret* alone were to take what had been bequeathed to them; so that throughout the will the testatrix discovered her anxiety to provide for them. In one event, some one of these children being selected by *Mary Beveridge*, that child would take, but if she did not appoint, then it was still to go to the same family, and be equally divided among all the children of *Margaret Howell*.

The four thousand dollars is to be divided among the eleven children of *Margaret Howell*. Judgment is therefore to be entered for one eleventh part for the plaintiffs, the amount by agreement to be settled by the attorneys of the parties.

Judgment for the plaintiff.

[PHILADELPHIA, MARCH 27, 1827.]

KINSEY against LARDNER Executor of KEEN.

CASE STATED.

Devise to testator's wife of the rents, &c. of two houses, and so much of lands as should remain unsold after payment of debts, &c. for the maintenance, clothing, and education of his children, to hold to his said wife during her natural life, or until [whilst] she should remain his widow, said rents for the aforesaid, and for her own support: but if she should think fit to alter her condition by marrying again, then she gave to her 60 pounds per annum during her life, and in lieu of all dower out of said rents; and at the death of his wife, or upon her second marriage, to his said children, or the survivors of them, the said houses and lands, to be divided between them by his said wife equally, share and share alike, as soon as they, or either of them, arrive at 21; vesting full power in his wife at any time to order a division of the estate so devised to his children after her death or second marriage: held, that the widow took an estate for life in trust for the purposes declared in the will, with a vested remainder to the children in fee as tenants in common.

THE following case was stated for the opinion of the Court.

Reynold Keen, Esq. formerly of the city of *Philadelphia*, made his last will and testament, dated the 22d *May*, in the year 1800, and directed, among other things, as follows:—

“I direct and order to be sold my brick messuage and tract of six acres of land in the township of *Moyamensing*, in the county of *Philadelphia*, now in the tenure and occupation of *Michael Miller*; also my brick kitchen and lot of ground in the district of *Southwark*, in the said county, now occupied by Mrs. *Talbot*; and as much of my lands in the counties of *Somerset*, &c. as will be amply sufficient to discharge my said debts and funeral expenses, and when sold good and legal titles to be made to the purchasers of the same by my executors and executrix hereafter named. (Then follow various specific legacies to his children.) Item, I give, devise and bequeath, to my sons *Peter*, *Reynold*, *Henri*—

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etta, Mary, now Mary Evans, Christiana, and Sarah, all my lands, tenements, hereditaments, and appurtenances thereunto belonging, situate, lying and being in the said township of Moyamensing, in the said county of Philadelphia, (excepting the messuage and six acres in the tenure and occupation of Michael Miller, which I have ordered to be sold,) the same being part of their mother Christiana's estate, which she conveyed in fee to James Johnston, and which he the said James Johnston reconveyed to me, to hold to them my said sons Peter, Reynold, and my said daughters Henrietta, Mary, Christiana and Sarah, their heirs and assigns, to be equally divided between them my said sons and daughters, share and share alike. But it must be understood and my will is, that unless my son Peter shall agree and give sufficient legal assurances that the part of his said mother's unalienable real estate in the said township of Mayamensing, which he by law is entitled to two shares of, shall with him and his said brothers and sisters be equally divided, share and share alike between them—he my said son Peter shall not be entitled to such part of my estate in the said township of Moyamensing already devised to him, but that the same shall be equally divided between my said son Reynold and my daughters Henrietta, Mary, Christiana, and Sarah, their respective heirs and assigns for ever, and he my said son Peter for ever barred from any part of my said estate, except the tankard, gold head cane, and watch already given to him. Item, as to the rest and residue of my estate real, (except the right I have to about sixteen acres of cripple at Pennypack, in the county of Philadelphia, which I likewise order to be sold for the payment of my legal debts and funeral expenses as aforesaid,) I dispose of the same in the following manner, to wit:—I give, devise and bequeath to my beloved wife Ann, all the rents, issues and profits of my house, kitchen and lot of ground in High Street, in the city of Philadelphia, and all the rents, issues and profits of my dwelling-house, kitchen, stable and lot of ground in Sixth Street, in the said city, together with the rents, issues and profits of so much of my lands in Somerset and Wayne counties, as shall remain unsold after payment of debts and funeral expenses, for the maintenance, clothing and education of my children, which she has had by me, namely, Laurence, Elisha, Elizabeth, Lucy Ann, Ann Le Conte, John, Lewis and Juliana, and such other child or children of mine that may hereafter be born of my said wife Ann—To hold to her my said wife Ann during her natural life, or until she shall remain my widow, the said rents and profits for the aforesaid, and for her own support and maintenance.—But if my said wife Ann shall think fit to alter her condition by marrying again, then I give to my said wife Ann the sum of sixty pounds per annum during her life, and in lieu of all dower from my real estate, to be paid her out of the rents and profits of the before mentioned houses and lands.—And at the death of my said

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wife *Ann*, or upon her second marriage, I give and devise to my said children, *Laurence, Elisha, Elizabeth, Lucy Ann, Ann Le Conte, John, Lewis and Juliana*, and such other child or children of mine that may hereafter be born of her my said wife *Ann*, or the survivors of them my said children by my said wife *Ann*, the aforesaid house, kitchen, and lot of ground in *High Street*, the house, kitchen, stable, and lot of ground in *Sixth Street*, and the lands in *Somerset* and *Wayne* counties, which shall be and remain unsold as aforesaid, to be divided between them my said children by my said wife *Ann*, equally share and share alike, and their respective heirs and assigns for ever, as soon as they, or either of them, my said children by my said wife *Ann*, shall have arrived at the age of twenty-one years. And I do further vest in my said wife *Ann*, full power and authority, if she shall think proper, at any time to order a division of the estate so devised to my said children by her, after her death or second marriage, before such her death or second marriage shall happen; in which case she shall then be entitled to receive 100 pounds *per annum* during her widowhood, or 60 pounds *per annum* if she marry again, as the case may be, which the estate so devised to my said children *Laurence, Elisha, Elizabeth, Lucy Ann, Ann Le Conte, John, Lewis and Juliana*, and such other child or children of mine, that may hereafter be born of my said wife *Ann*, shall be security of the payment of the said sum of 100 pounds, or the said sum of 60 pounds *per annum*, a proportion of either sum to be fixed upon each child's part or division of said estate.

This will was duly proved on the 30th day of *August*, 1800, in the Office of the Register of Wills. All the executors (except *John Lardner*) and the executrix, the said *Ann*, are dead. *Laurence* and *Lewis* died intestate, unmarried and without issue, after the decease of the testator, and during the life of the widow *Ann*. *John*, one of the said devisees, residing in *New York*, made his last will and testament, dated on the 4th *October*, 1817, whereby he devised and bequeathed all the real and personal estate of which he was possessed, and to which he might be entitled according to the will of his father, the said *Reynold Keen*, deceased, after the death or marriage of his mother, to his sister *Julian Keen*, and his two nephews *Laurence* and *John*, sons of his brother *Elisha* and their heirs for ever, and afterwards during the widow's life died, all the remainder of the testator's children, viz. *Elisha, Elizabeth, Lucy Ann, Ann Le Conte*, and *Juliana* are still alive.

The house in *Market Street* mentioned in the will of the said *Reynold Keen*, was sold for the payment of the debts of the testator, and the surplus vested in bonds and mortgages, remains in the hands of *John Lardner*, the surviving executor, ready to be divided as the court shall decide.

The first question for the court is whether there was such an

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interest in the house and the proceeds of the sale thereof, in *John Keen*, as enabled him to dispose of the same by his will.

The second question for the court is, whether there was such a right vested in *John Keen* as to enable him to dispose of any part of the real estate of *Reynold Keen*, deceased.

P. A. Browne, for the plaintiff. *John* had not a present devise, but the devise was a contingent limitation; and consequently he had nothing to transfer by his will. There must be a devisee *in esse* when the interest is to vest. *Bret v. Rigden*, *Plow.* 345. The insertion of the word heirs, will not strengthen the case. From the whole will, it is evident that the intent was that the estate should not vest in the life of the widow. 1 *P. Wms.* 83, 84. *Williams v. Davenport*, 1 *Ca. in Eq.* 216. *Tit. dev. No. 5.* *Smell v. Dee*, 2 *Salk.* 415. *Dyer*, 59. 1 *Burr.* 227. 1 *Atk.* 500. *Eq. Ca. Abr.* 205. 2 *Stra.* 905.

Tod, contra. He meant to dispose of the residue of his real estate. A devise of rents, issues and profits is a devise of the house itself. 1 *Burr.* 228. *Hayward v. Whitby*, is the very case before the court. 3 *Com. Dig.* 415, 16. *Tit. devise, No. 2.* Lease of land at 10 pound rent, a devise of the rent carries the land. Here my position is, that this was a present devise of the house to the wife and children, for support of children. 2 *Vern.* 561. 2 *Stra.* 1020. *Kerlin's Lessee v. Bull*, 1 *Dall.* 175, is very like the present. The distinction is between legacies and devises.—The first is governed by the civil and ecclesiastical law. 4 *Bac.* 394. 2 *Vern.* 673. 2 *Vent.* 342. Even a legacy bearing interest is vested. 2 *Eq. Ca. Abr.* 543. If any of these children had left children, it never would have been the intention of the devisor to disinherit them; yet they must be so on the construction of the plaintiff. 1 *P. W.* 96. 7 *Bac. Abr.* 471. 1 *Eq. Ca. Abr.* 292, 393. *Singer v. Phillips*, 3 *Burr.* 1181. *Rose v. Hill* is exactly in point. There the court held it a vested devise. The words tenants in common could make no difference. The words are applicable to those who survive the father. The general intention was to provide for his off-spring, and the Court will modify all minor intents. The testator has not himself given a construction different from mine: he only empowers the wife to accelerate the time of enjoyment.

Browne, in reply. Here the whole property is not devised with a particular interest devised out of it. The property is not given till the mother's death.

The opinion of the court (the Chief Justice having been absent at the argument, took no part in the decision,) was delivered by

GIBSON, J. The distinction between merely appointing a time for payment of a legacy, and annexing the time to the very substance of the gift, is borrowed from the civil law: and the rule of construction which in this particular governs in cases of legacies, is

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inapplicable to devises, which are governed by the common law. But we may safely rule this cause on the authority of *Goodtitle v. Whitby*, (1 Burr. 228,) which is in point. There the devise was to trustees to apply the rents and profits to the maintenance and education of the testator's nephews during their minority, and *when*, and *as* they should respectively attain the age of twenty-one, then to the use and behoof of the said nephews and their heirs equally: And this was held to be a present devise to the nephews, chiefly on the authority of *Boraston's Case* (3 Rep. 210) which contains a rule that will be found to govern every case of the kind; namely, that where an absolute property is given, and a *particular* interest is given *in the mean time*, that circumstance shall not operate as a condition, but as a description of the time when the remainderman is to take in possession: and Lord MANSFIELD remarks that this is sufficient to answer the intention of the testator, the devisee not wanting the estate in the mean time. In the case before us the devise is to the testator's widow for life, or during widowhood, in trust to apply the rents and profits to the maintenance and education of the testator's children, and to the support of herself; and on her death or second marriage, he devises the premises to the children and their heirs respectively, share and share alike. The devise is then, in trust for the children and the widow in the mean time: and according to *Boraston's* case, this is a present devise to the children along with the widow. They are even beneficially interested in the trust, which is to apply the profits to their maintenance and education: and a devise of the profits is a devise of the land. (*Kerry v. Derrick*, Cro. Jac. 104.) It is true there is a beneficial interest given to the trustee; whereas in *Goodtitle v. Whitby* there was none; but the difference is disposed of by the rule in *Matthew Manning's* case (8 Rep. 95. b.) according to which the interest of the trustee is to be considered only as an exception out of the absolute property given to those who are the chief objects of the testator's bounty. But what puts his intention out of all doubt is the authority given to the widow, if she shall think fit, to divide the estate among the children in her life time, and *before* her second marriage. From this it is evident he intended that only the time of enjoyment should be postponed till the happening of one of the contingencies; and it is beside incredible that he should have intended to disinherit the issue of any of his children who might happen to die in the life time of the widow, and before her second marriage. The point is not new; but cases like the present have frequently occurred in this country: as in *Kerlin's Lessee v. Bull* (1 Dall. 175) *Doe v. Provoost*, (4 Johns. 61.) and *Ray v. Enslin & Ray*, (2 Mass. Rep. 554.) I am of opinion then that the widow took an estate for life in trust for the purposes declared in the will, with a vested remainder to the children in fee, as tenants in common: and that the judgment be rendered for the defendant.

Judgment for the defendants.

[PHILADELPHIA, MARCH 30, 1827.]

SIMS'S Administrator *against* CHEW and another.

A. and B. being the administrators of C. who died indebted, as partner of the firm of C. and D. to E. by specialty, and to F. by simple contract, and leaving a separate real estate, contracted, by virtue of a private act of assembly, to sell part of the said estate to F. who was to retain the purchase money, the amount of which was to be credited in the books of the firm. At the time of the contract, the firm was in good credit, and supposed to be solvent. It turned out, however, to be otherwise; and the administrators, to guard themselves against the consequences of a devastavit, took from F. the purchaser, a bond, conditioned to indemnify them against liability to the other creditors, in consequence of making the conveyance. The estate was then conveyed to F. who afterwards sold it; and A. who had since become the executor of E. alleging that he had in that character, a lien upon the estate conveyed to F. for the debt due from the estate of C. to that of E, it was agreed at the request of F. that the purchase money should be substituted for the land, and placed in the hands of the defendants, as trustees. A. being one of them, to be applied to the satisfaction of the alleged lien, in case it should be established. *Held*, that, as A. in the character of administrator of C. was liable for a devastavit, to those who were entitled under the will of E. and as on a recovery against him, the bond of indemnity given by F. would be forfeited at law, he was entitled, on the principle of *quia timet*, to retain the fund in his hands, to satisfy the debt due to the estate of E.

An agreement to try who might be entitled to a fund in the hands of the defendants as stockholders, liberally construed, for the purpose of doing complete justice between the parties.

THIS action was brought by the administrator of *Walter Sims*, deceased, against *Benjamin Chew* and *William Rawle*, to try the right to a sum of money in the hands of the defendants. It was tried before DUNCAN, J. at *Nisi Prius*, and a special verdict found, stating the following facts:—

On the 6th November, 1806, *Philip Nicklin* died, being largely indebted to sundry persons, as well in his separate capacity as in his capacity of partner of the house of *Nicklin & Griffith*. He was indebted to *Benjamin Chew* the elder, in a bond jointly and severally with *R. E. Griffith*, his partner, in the sum of 28,346 dollars and 79 cents: he was also largely indebted to *B. Chew* the younger, one of the defendants. Being so indebted, he conveyed to *B. Chew*, and *B. Chew* the younger, the estate called the Hill, (situate in the county of *Philadelphia*,) by a defeasible deed, dated the 8th March, 1804, but not recorded, for the purpose of securing them for loans and indorsements of notes made or to be made. At the decease of *Nicklin*, the firm of *Nicklin & Griffith* was in good credit, and reputed to be solvent. Administration to *Nicklin's* effects was granted to *Juliana Nicklin* and *B. Chew* the younger. On the 4th April 1807, an act of assembly was passed by the legislature of *Pennsylvania*, by which it was enacted, “that it shall and may be lawful for the administratrix and administrator of *Philip Nicklin*, to make sale of, and in due form of law to grant, bargain, sell and convey all and singular the real estate

(Sims's Administrator v. Chew and another,)

and estates within this Commonwealth, whereof the said *P. Nicklin* died seised or entitled unto in law or equity, in his sole and separate right, under any patent, deed, contract, warrant, survey, or location whatsoever, at such time and times, in such parts and parcels, for such estate and estates, upon such considerations, and to such person and persons, as the said administratrix and administrator shall deem fit and expedient, and the proceeds of the last mentioned sales shall be appropriated and applied by them for and towards the payment of the debts and engagements of the said *P. Nicklin*, as well in his separate capacity as in his partnership concern, and the surplus thereof shall be divided and apportioned in the same manner as is provided by law for the division and apportionment of an intestate's estate: *provided*, that before a deed shall be executed for any of the real estate annexed, in pursuance of this act, the said surviving partner, in case the sale be made by him and the said administratrix and administrator, in case the sale be made by them, shall give bond to the Orphans' Court of *Philadelphia* county, with surety to be approved of by that Court, for the due performance of their respective duties herein."

An agreement, in writing, was made on the 8th May, 1807, (recorded the 30th June 1807,) between *B. Chew* the younger, one of the administrators of *Nicklin*, (stated to be under the authority of the act of assembly aforesaid,) and *Walter Sims*, by which it was agreed on the part of the said *Chew*, junior, administrator as aforesaid, on behalf of himself, and by and with the privity approbation and consent of Mrs. *Juliana Nicklin*, widow and administratrix of the said *Philip Nicklin*, for and in consideration of the sum of 15,000 dollars, to sell and dispose of to the said Captain *Walter Sims*, and to his heirs and assigns, all that messuage or country seat of the said late *Philip Nicklin*, called the hill, near the falls of *Schuylkill*, together with all and every the houses, out-houses, and lands appertaining to the same, containing about thirty acres bounded, &c.; the entire possession of which shall be delivered to the said Captain *Walter Sims*, as soon as the furniture, moveables and other articles belonging to the estate, can be removed, which shall be done with all possible despatch, and a deed executed and delivered to Mr. *Sims* for the premises, to convey all and every the estate therein of the said late *Philip Nicklin* to the said Captain *Walter Sims*, his heirs and assigns. And whereas the late firm or co-partnership of *Nicklin & Griffith* were, and yet are indebted to the said *Walter Sims* in an unascertained sum, the amount of which is at present considered and believed to be more than the before mentioned sum of 15,000 dollars, it is agreed, understood and declared, that the said sum of 15,000 dollars is to be credited and settled as part of the account between the said *Nicklin & Griffith*, and the said *Walter Sims*, as payment made on the 8th day of May instant, to the said *Walter Sims*, from the estate of the said late *Philip*

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Nicklin, for and on behalf of the firm of *Nicklin & Griffith*, and to be settled accordingly, by and between the said *Walter Sims* and *Robert E. Griffith*, the surviving partner of the house of *Nicklin & Griffith*; and in case it should so happen in the settlement of the accounts between the said *Walter Sims* and the said firm of *Nicklin & Griffith*, that the said balance due from the said *Nicklin & Griffith* to the said *Walter Sims* should be less than the sum of 15,000 dollars, then, and in such case, the said *Walter Sims* is to pay over to the before mentioned *Chew*, junr. and *Juliana Nicklin*, administrators as before said, such sum or sums as may be the difference between the balance due from the said *Nicklin & Griffith* to the said *Walter Sims*, and the sum of 15,000 dollars.

The house of *Nicklin & Griffith* stopped payment in the month of *June* or *July* 1807, and *Griffith* made a general assignment in *December*, 1807. Suits were brought in the Court of Common Pleas of *Philadelphia* county by *B. Chew* the elder, against *Griffith*, and against the administrators of *Nicklin*, in 1808, and judgments obtained, which were afterwards revived by *scire facies*. On the 18th *August*, 1809, security was entered in the Orphans' Court, conformably to the act of assembly aforesaid, by the administrators of *Nicklin*. On the 18th *August*, 1809, *Walter Sims* executed a bond of indemnity to *Juliana Nicklin* and *B. Chew*, the younger, administrators, aforesaid, in the sum of 15,000 dollars, the condition of which was as follows:—

Whereas *Philip Nicklin*, late of the city of *Philadelphia*, merchant, having died intestate, administration of all and singular his goods, chattels, and credits was, on or about the 18th day of *November*, 1806, committed to the said *Juliana Nicklin* and *Benjamin Chew*, jun., and whereas the said *Philip Nicklin* died seised, (*inter alia*,) of a certain messuage or tract of land situated in the now township of *Penn*, in the county of *Philadelphia*, containing thirty acres or thereabouts, known and called by the name of "*The Hill*," and the estate of the said *Philip Nicklin* being alleged to be indebted to the late co-partnership of *Nicklin* and *Griffith*, and the said *Nicklin* and *Griffith* being indebted to the above bounden *Walter Sims*, and an act of assembly of the commonwealth of *Pennsylvania*, entitled "An act to authorize the sale and conveyance of the real estate of the said *Philip Nicklin*, by his surviving partners and legal representatives," having been passed, it was agreed, on or about the month of *May*, 1807, by and between *Robert E. Griffith*, surviving partner of the said *Nicklin* and *Griffith*, the said *Juliana Nicklin* and *Benjamin Chew*, jun., and the said *Walter Sims*, that the latter should take the said estate called *The Hill* at the price or sum of fifteen thousand dollars, and should give credit for that sum, in account to and with the partnership concern of *Nicklin* and *Griffith*, and that the said partnership concern should give credit to the estate

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of the said *Philip Nicklin*, in account for the like sum; and whereas, although an agreement for the conveyance of the said estate called *The Hill* was reduced to writing and signed by the said *Benjamin Chew*, jun., for and in behalf of himself and the said *Julian Nicklin*, administrator and administratrix as aforesaid of the one part of the said *Walter Sims* of the other part, yet from various causes the said agreement has not yet been carried into effect, and it hath been this day agreed that the said *Benjamin Chew*, jun., and *Juliana Nicklin*, administrator and administratrix as aforesaid shall fulfil and complete the said sale.

Now this obligation is such, that if the above bounden *Walter Sims*, his heirs, executors, and administrators shall and do from time to time, and at all times hereafter, well and truly indemnify and save and keep harmless, the said *Juliana Nicklin* and *Benjamin Chew*, jun., and each of them, their heirs, and each of their heirs, executors, and administrators, of, from, and against all controversies, suits, claims, and demands whatsoever, and more particularly from and against all and every the private creditors of the before-mentioned *Philip Nicklin*, the partnership creditors of the said *Nicklin* and *Griffith*, and each and every of them for or by reason of their the said *Benjamin Chew*, jun., and *Juliana Nicklin*, administrator and administratrix as aforesaid, so completing the said agreement, and making and executing a deed of conveyance of the said premises, then the above obligation to be void; otherwise to be in full force and effect. On the 19th of *August*, 1809, the administrators of *Nicklin* executed a deed of the *Hill* estate to *Sims*, reciting the act of assembly, and agreement of the 8th of *May*, 1807. *Sims* had not notice of the existence of a defeasible deed on the 16th of *May*, 1807; but had notice of the existence of a defeasible deed on the 19th of *August*, 1809. *B. Chew* the younger acted as the agent of his father in these transactions. *B. Chew* the younger executed a deed of release and assignment of all his right, title, and estate of, in, and to the said defeasible deed, or the premises therein described, on the 19th of *October*, 1809. *B. Chew* the elder died on the 17th of *January*, 1810. On the 22d of *November*, 1820, an agreement was made between *B. Chew*, the executor of *B. Chew*, deceased, and *W. Sims*, the executor of *W. Sims*, deceased, whereby the sum of six thousand three hundred and sixteen dollars and fifty-five cents, were deposited in the hands of the present defendants, as trustees. On the 3d of *May*, 1823, the sum of one thousand eight hundred and fifty-nine dollars and sixty-one cents were received by the said *B. Chew* from *Griffith*, and the like sum, part of the fund so held in trust, paid over to the legal representatives of the said *W. Sims*, leaving four thousand five hundred and thirteen dollars and twenty-seven cents in the hands of the said trustees.

The deed of the 20th of *October*, 1809, and agreement of the 22d of *November*, 1820, were as follows:—

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"Know all men by these presents, that I, *Benjamin Chew*, junior, one of the parties mentioned in a certain indenture, or deed in the nature of a mortgage, bearing date the 31st day of *May*, 1803, made and executed by and between *Philip Nicklin*, of the city of *Philadelphia*, merchant, of the one part, and *Benjamin Chew*, Esq., and *Benjamin Chew*, jun., of the county of *Philadelphia*, of the other part, for and in consideration of one dollar to me paid by *Walter Sims*, of the county of *Philadelphia*, gentleman, the receipt whereof I do hereby acknowledge, have assigned, transferred, released, and confirmed, and by those presents do assign, transfer, release, and confirm, unto the said *Walter Sims*, his heirs and assigns, all the estate, right, title and interest, which I now hold, or may or can have hold, claim, or possess, of, in, or to the said indenture, or mortgage deed, and the tract or parcel of land situate in the then township of the *Northern Liberties*, now the township of *Penn*, in the county of *Philadelphia*, containing thirty acres, or thereabouts, with the appurtenances, as the same is described in the said mortgage deed, being part of the estate of the said *Philip Nicklin*, now deceased,—to have and to hold to the said *Walter Sims*, the said tract of land with the appurtenances, and all the estate, right, title, and interest which I may or can have, hold, claim, or possess, of, in, and to the same, by virtue of the said recited indenture, to the proper use and behoof of the said *Walter Sims*, his heirs and assigns for ever.

"Be it also further known, and it is hereby declared and agreed, that the above assignment, release, and transfer is made, and is to be considered as made by me, under the express reservation and condition, that it shall and will not interfere with, abridge, or lessen any right that I may have had, or may or can have, to proceed against, resort to, or pursue any part or parts of the estate of the hereinbefore mentioned *Philip Nicklin*, or the firm of *Nicklin and Griffith*, other than the tract or parcel of land hereinbefore referred to, containing thirty acres or thereabouts, with the appurtenances, for any debt or debts, claim or claims, that may be due and owing to me by the said *Philip Nicklin*, or the firm of *Nicklin and Griffith*.

"And, further, that this assignment is made to the said *Walter Sims* at his risk, without my being in any wise accountable for the same, and with the knowledge of the said *Walter Sims* that two judgments have been obtained in the Court of Common Pleas, in, and for the county of *Philadelphia*, and remain open and undischarged against the administrators of the said *Philip Nicklin*, deceased,—the one at the suit of *Benjamin Chew*, Esq., and the other at the suit of *Charles Kirkham*.

"In witness whereof, &c.

"October 20th, 1809."

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“Whereas the executors of *Walter Sims*, late of the county of *Philadelphia*, have negotiated a sale of the messuage and estate called *The Hill*, situate in *Penn* township in *Philadelphia* county, part of which heretofore belonged to *Philip Nicklin*, now deceased, and whereas the executrix and executor of *Benjamin Chew*, deceased, hold a judgment against the administrators of the said *Philip Nicklin*, and for the balance alleged to be due thereon, contend, that as well the said real estate of the late *Philip Nicklin* in *Penn* township, as *Robert E. Griffith*, surviving partner of *Nicklin* and *Griffith*, is liable, which is denied by the executors of the said *Walter Sims*: Now, at the instance and request of the executors of the said *Walter Sims*, and for their accommodation, it is agreed hereby, that for the purpose of securing the debt alleged to be due, as aforesaid, from the estate of the aforesaid *Philip Nicklin* to the estate of the said *Benjamin Chew*, as soon as the said debt shall be established, the executors of the said *Walter Sims* shall and will forthwith and without delay, secure, set apart, and appropriate, out of the monies raised by the sale aforesaid, the sum of six thousand three hundred and sixteen dollars, and fifty-five cents, which shall be held and reserved for the payment and satisfaction of the claim of the executors, or executor of the aforesaid *Benjamin Chew*, and which sum shall be secured by an immediate investment of the said amount in the public stock of the *United States*, or in the stock of one of the banks of the city of *Philadelphia* to the satisfaction of *Benjamin Chew*, the surviving executor of the said *Benjamin Chew*, deceased, in the names of *Benjamin Chew* and *William Rawle*, as trustees, to be ultimately paid over to the executor or executors of the aforesaid *Benjamin Chew*, in case and whenever they shall establish their right or the right of the estate of the late *Benjamin Chew* to the said debt against *Philip Nicklin*, or so much thereof as they shall be found entitled to, including the interest accruing. In consideration whereof, the executors of *Benjamin Chew* hereby engage to release to the purchaser of the said estate called *The Hill*, all claims and demands whatsoever, except only that the judgment by them held against the said *Philip Nicklin* shall be and remain in full force and effect by way of security for the performance of this agreement, until the same shall be fully executed by the raising of the proper securities in lieu thereof, as above mentioned, which stock or securities, and the proceeds thereof in the hands of the aforesaid trustees, whether as interest, dividends, or otherwise, are hereby expressly agreed and declared, and in all respects to be considered as a substitute and in the place and stead of the land or real estate of that part of the premises called *The Hill* which was part of the estate of the late *Philip Nicklin*, and as completely liable for and subject to the payment of the debt and interest alleged as aforesaid to be due from the estate of the late *Philip Nicklin* to the estate of the late *Benja-*

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min Chew, deceased, if the same or any part of the same shall be established, as fully, unequivocally, and completely, to all intents and purposes as the land or real estate hereinbefore mentioned might or could have been, if this instrument of writing, or the proposed release not yet executed, had not been made or adopted, the same being now proposed, as before stated, merely for the present accommodation of the estate of the late *Mr. Walter Sims*, and not with any view, design, or intent to lessen or in any way to injure or abridge the right or claim of the estate of the late *Benjamin Chew*, or of his executor or executors, of, in, and concerning the debt alleged to be due to the estate of the late *Benjamin Chew*, from the estate of the said *Philip Nicklin*, deceased, or from the estate of the said *Robert Griffith*; and it is at the same time further agreed and declared to be the true intent and meaning of both parties to these presents, that nothing herein contained shall be deemed or taken to amount to an acknowledgment on the part of the executors of *Walter Sims* that the said debt is due from the estate of *Philip Nicklin*, or any part thereof, on the judgment hereinbefore mentioned, nor that if any thing is due, that the premises hereinbefore mentioned, are liable for the same.

"In witness whereof, we the subscribed have hereunto set our hand this twenty-second day of *November*, in the year of Lord eighteen hundred and twenty.

Benjamin Chew, Executor.

Walter Sims, { One of the executors of
 { *Walter Sims*, deceased.

The case was argued by *Rawle*, jun., and *Rawle*, for the plaintiff, and by *S. Chew*, and *J. R. Ingersol*, contra.

The opinion of the court was delivered by

GIBSON, J. On the facts found, I should be unable to determine whether the deed of trust be void for want of notice, the jury not having passed on the existence of notice at the date of the bond of indemnity, when the contract was new modelled, which, therefore seems to be the time material to the question; or whether the interest of the elder *Mr. Chew* under it, if any existed originally, ought to be postponed in consequence of the acts of the younger *Mr. Chew*, who was his agent. Haply a solution of these questions is unnecessary, as independently of his supposed rights under the deed of trust, and independently of the effect of the judgment against the administrators of *Mr. Nicklin*, which undoubtedly created no lien in addition to that which before existed under the intestate acts, the defendant, *Mr. Chew*, has a personal interest in the event which ought to be protected in this suit.

Divested of unnecessary circumstances, the case is just this: *Mr. Chew* and *Mrs. Nicklin* are the personal representatives of *Mr. Nicklin*, who is dead, intestate, and indebted, as the partner

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of Mr. *Griffith*, in a large sum to the elder Mr. *Chew*, and in another large sum to Captain *Sims*: and having left a separate real estate as assets. Pursuant to a private act of Assembly, this estate is sold to Captain *Sims*, not for the payment of debts generally, but for a sum supposed to be the amount of Captain *Sims*'s debt; and it is agreed that the purchase money shall be retained in payment of this debt, and credited accordingly in the books of the late firm. At this time the estate of Mr. *Nicklin* is supposed to be solvent, but the administrators afterwards deemed it prudent to provide against the risque of devasting, and Captain *Sims* executes a bond and warrant conditioned to indemnify them against liability to the other creditors. The estate is then conveyed, and is afterwards sold by Captain *Sims*, at whose request an arrangement is made, by which the purchase money is substituted for the land, and put within reach of the equity powers of this court, to determine the right of the executor of the elder Mr. *Chew* to any part of it; the contingency for which the bond of indemnity was intended to provide, having happened by the ascertained insolvency of Mr. *Nicklin*'s estate.

Now although the deed of trust be void as a security, and it be admitted (as it must) that the judgment against *Nicklin*'s administrators created no lien, it is certain that the existence of the debt intended to be secured, is unaffected by any of these circumstances. It is certain also, that the elder Mr. *Chew* had a lien for this debt in common with the other creditors; that the younger Mr. *Chew*, as administrator of Mr. *Nicklin*, is liable for a devasting to those who are entitled under the will of his father; and that on a recovery against him, the bond of Captain *Sims* would be forfeited at law. The question then is, whether a court of equity will compel him to perform the covenant in the condition of his bond, or leave the obligees to their remedy at law: and haply this part of the case is free of difficulty, nothing being more certain than that, on the principle of *quia timet*, equity will execute a general covenant of indemnity sounding in damages: As in *Ranelagh v. Hayes*, (1 *Vern.* 189,) where the plaintiff had assigned certain shares of the excise in *Ireland*, to the defendant, who covenanted to save the plaintiff harmless, and stand in his place touching the payments to be made to the king. The plaintiff suggested that he was sued by the king, and prayed that the defendant be decreed to perform his agreement; and the Lord Keeper decreed him to clear the plaintiff from all suits within a reasonable time; and compared the case to that of a counter bond, where, although the surety be not molested, yet will the principal be decreed to discharge the debt at any time after it has become due on the original bond. The same principle was held in *Champion v. Brown*, (6 *Johns. Ch. Rep.* 406,) and in *Ward v. Buckminster*, (cited 10 *Ves.* 162, and 3 *Atk.* 385.) In *Pennsylvania* the courts have acted on an analogous principle, by permitting a vendee to retain the purchase

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money, to indemnify for a defect in the title against which the vendor has covenanted to warrant; and this before eviction. For the rest, I cannot do better than refer to the very satisfactory opinion of my brother DUNCAN, in *Funk v. Voneida*, (11 Serg. & Rawle, 115, 16.) who has, with his usual industry brought together all the learning on the subject.

On general principles of equity, then, it cannot be denied that the administrator of Captain *Sims* is bound to perform the covenant contained in the bond of indemnity, by paying the debt due to the executor of the elder Mr. *Chew*. But it is said the abstract rights of the parties are not before us; that those beneficially interested under the will of the elder Mr. *Chew*, cannot come in on the personal equity of the executor; and that our inquiry is restrained to a single point, by the agreement under which the cause is submitted.

I approach this agreement with a determination to construe it liberally for the purpose of doing complete justice to all parties; and to this end, instead of laying hold on particular expressions, I will have regard to the object and scope of the whole. The deed of trust is not even mentioned in the agreement; but the judgment against *Nicklin's* administrators is, and I concede that Mr. *Chew* believed that the claim on the part of his father's estate depended on the lien which he supposed arose from it; and that both parties contemplated this as the matter to be determined. But was it the end proposed, or only accessory to the end? The agreement was entered into at the solicitation of Captain *Sims*, and why should Mr. *Chew* agree to narrow the ground of his claim to a point? He did not so agree. The parties expressly declare that he is not to give up a particle of his right. The purchase money is to be substituted for the land, and subjected to the claim of the executor of the elder Mr. *Chew*, "as fully, unequivocally, and completely to all intents and purposes as the land or real estate herein before mentioned, might or could have been, *if this instrument of writing had not been made or adopted*, the same having been proposed merely for the present accommodation of the estate of the late *Walter Sims*, and not with any view, design, or intent to lessen, or in any wise to injure or abridge the rights or claim of the late *Benjamin Chew*, concerning the debt alleged to be due." After this explicit declaration, can it be doubted that Mr. *Chew's* executor may have recourse to the fund on any ground that would have sustained him in having recourse to the land; or is it of any consideration that the parties misapprehended the foundation of the claim? It will be sufficient for the purposes of the argument, to show that the executor was entitled to satisfaction out of the land, on any ground.

I am not going to admit that a party may not stand on any equity but his own. On the contrary, where justice cannot be done to A. without decreeing performance of an act to B, it will be de-

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creed. But I undertake to show that the executor was entitled to satisfaction out of the land, not only upon his own equity, but upon the equity of those who are beneficially interested under the elder Mr. Chew's will. As regards this part of the case, it is of no importance that one of the persons who, as administrators of Mr. Nicklin, confessed the judgment to the elder Mr. Chew, and also effected the sale to Captain Sims, is the same person who, as executor of his father, now insists on having the judgment satisfied out of this fund. *Quando duo jura in una persona concurrunt, æquum est ac si essent in duobus.* This maxim is applicable with peculiar force, inasmuch as the executor is a trustee for persons who can render the claim effectual only through his instrumentality; consequently their equity is his equity. Beside, all objection of a personal nature, on account of his having been a party to a transaction which he now attempts to overturn, is met by his own personal equity under the bond of indemnity. If, then, the persons claiming under the will are entitled to come on this fund, their trustees are entitled to come on it for their benefit. Now what are the facts? Captain Sims purchased on terms of receiving all the assets in payment of his own debt, leaving for the debt of Mr. Chew absolutely nothing but the desperate chance of payment by the surviving partner. It is of no consideration that, at one period, the insolvency of Mr. Nicklin's estate was unknown; before the transaction was consummated it was suspected, as is shown by the bond of indemnity, and that ought to have put Captain Sims on his guard. As a general rule, I agree that a purchaser from an executor is not bound to see to the application of the purchase money; and subject to the same qualification, I agree that an assignment of the assets in payment of an antecedent debt, is an assignment for valuable consideration; as was held by this court in *Petrie v. Clark*, (11 Serg. & Rawle, 377.) But in all such cases the creditor must act with scrupulous good faith; for if he knows, or has reason to suspect, the payment to be a misapplication of the assets, or prejudicial to the rights of the other creditors, he is a party to the devastavit, and equity will follow the assets into his hands. For this I refer to the authorities cited in support of the decision in *Petrie v. Clark*. But why should not a creditor who has obtained more than his share of the assets, even without fraud, be compelled to refund? To permit him to obtain such an advantage, would be a breach of trust on the part of the executor, and to retain it would be against conscience on his own; and that would be sufficient to give jurisdiction to chancery which follows the assets, not on the supposition of a lien, but because one who purchases *mala fide*, or without valuable consideration, acquires no other interest than what the executor had, and stands precisely in his place as a trustee. Now it is indisputable that the sale to Captain Sims was without consideration, except so far as he was entitled to payment out of the assets. For the excess, he was in the

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predicament of one to whom the assets are given away; and in such a case none will pretend that a chancellor would leave the other creditors to their remedy against the person of the executor. By the laws of *Pennsylvania*, this real estate was assets for payment of the debts. It was sold as such by virtue of a private act of Assembly, and for the purposes of the argument, is to be treated precisely as a chattel. If so, the decision in *Petrie v. Clark*, fortified as it is by repeated decisions of the *English* Court of Chancery, both before and since the *American* revolution,^(a) establishes a principle that covers the whole ground of the argument, to wit; that where the sale is collusive or without consideration, equity follows the assets into the hands of the purchaser.

Thus, the equity of those who are beneficially interested under the elder Mr. *Chew's* will, furnishes a distinct ground on which the claim of his executor, may be sustained, and one which is within not only the spirit, but the letter of the agreement. But on both the grounds which I have indicated, I am of opinion that judgment be rendered for the defendants.

DUNCAN, J. It is with reluctance I dissent from the opinion just delivered, because I think the representatives of *Benjamin Chew* have a right to recover this debt, through the security of the indemnifying bond given to the administrators of *Philip Nicklin*. But the agreement on which this action is founded is confined to one inquiry,—were the *Hill* lands bound by the judgment, or had *Benjamin Chew* any lien on the land, by virtue of the defeasible deed? It is admitted that the judgment does not bind. There, in my opinion, the question ends; for the trust provides for nothing else. The stock represents the land. If the land was not bound, the stock was not. It is a proceeding in rem. That thing, (the land,) and the liability of the land, was the exact question intended to be raised. The defeasible deed in the nature of a mortgage, to secure loans made and thereafter to be made, was a mere security for the loans, and, not being recorded within six months, nothing passed until the registry; and the registry, being after Mr. *Nicklin's* death, could not disturb the order of distribution fixed by our laws. There could be no relation to the execution of the instrument. The notice to *Sims* was immaterial. His right to distribute depended on the grade of his debt,—the order of payment prescribed by law. Besides, the whole arrangement shows that the land was not to be bound. The bond of indemnity was to secure the administrators from all creditors who might suffer by the preference given to *Sims*. The estate of *Nicklin* was supposed to be insolvent: this was not known at the time of the first agreement,

(a) In *McLeod v. Drummond*, (17 Ves. 150,) Lord ELDON, after reviewing the cases prior to, and since the *American* revolution, adopts, in its full extent, the principle of *Petrie v. Clark*.—Reporters.

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but was well known when the conveyance was executed; and this bond of indemnity was the basis on which the conveyance was given, and is as broad as the subject required. "Indemnify, save, and keep harmless from and against all controversies, suits, claims, and demands whatsoever," and more particularly, "from and against all and every the present creditors of *Philip Nicklin* or *Nicklin* and *Griffith*," by reason of the completing of the title.

The decision in *Chew v. Griffith*, was made on the ground of the relative equities of the parties. The administrators had confessed a judgment of record admitting assets. That judgment standing in full force, the case stated not that the debt was extinguished by the creditor's making one of the administrators of his debt or one of his executors, unless the administrators had assets, and the judgment showed there were assets, but that stumbling-block has been removed, for the very purpose of showing that there were not assets on a proper plea to the action. So, if *Sims's* executors could show there were assets, *Benjamin Chew's* representatives never could recover on the bond of indemnity against him on account of this debt.

The fund, by the express stipulation, is to be considered in the place and stead of the land, subject to all intents and purposes as the land, except for this argument. In fact, it is a case now to be decided on as an execution against *Sims* would have been by a purchaser at sheriff's sale. On this judgment of *Benjamin Chew* against *Nicklin's* administrators the remedy against *Sims* is on the personal security. The whole transaction shows that the administrators indisputably parted with the title, but at the same time it proves the personal liability of *Sims*. I put out of question the defeasible deed: it could not bind by the relation to its date, not being recorded within six months. As to the grantor and his heirs, the estate might pass, but not as to the creditors, by enrollment after his death. The right of the creditors attached, and there can be no relation to affect them. The recording acts of 1715 and 1775 are very different. No estate does pass in the case of defeasible deeds, unless recorded within six months. In the case of absolute deeds the estate does pass, to be divested in case of a purchaser or mortgagee without notice, when the conveyance is not recorded within six months.

I have endeavoured to bring my mind to the same conclusion with the majority of the court, because the justice of the cause is in favour of the claim of *Benjamin Chew's* representatives; but I do not feel myself at liberty to go out of the four corners of the agreement, which was intended to raise only one question—the liability of the land on the judgment of *Mr. Chew*: the land not being liable, its substitute is not liable. The result would be the same—a recovery against *Sims's* executors. The course would be more circuitous on the bond of indemnity, but the present claim is not founded on that, and I cannot, to avoid circuitry, make a new

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agreement for the parties, nor marshal the assets to meet my own notions of the equities of the parties. The action is founded on the agreement, and on that agreement my opinion is, that *Benjamin Chew's* representatives are not entitled.

ROGERS, J., concurred with GIBSON, J.

TILGHMAN, C. J., being related to one of the defendants, and HUSTON, J., indisposed, took no part in the decision.

Judgment for the plaintiff.

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[PHILADELPHIA, MARCH 29, 1827.]

STEEL and another *against* TUTTLE.*

IN ERROR.

A. assigned his estate by indenture, dated the 28th of *March*, 1823, to B. C. and D., in trust, in the first place, and before any other debts due, or which might be due by him to any person whatsoever, fully to pay and satisfy B. for any claim he then had, or thereafter might have on A. for any debt due to him, and to indemnify B. against any and every responsibility he then was, or might be under, for or on account of any promissory notes given or indorsed by B. for the use, benefit, or advantage of A. It was provided by the assignment, "that no one of the creditors of A., nor should any one having claims on him, have, receive, take, or enjoy, any part of the estate assigned, unless such creditor or person should, within three months after the execution of the said assignment, and notice thereof in two daily papers of the city of *Philadelphia*, execute and deliver to A. a general release of all claims against him." The assignment also contained a general power of attorney to the assignees, for the purpose of enabling them to execute the trusts created by the assignment, and to collect the estate, &c. B. C. and D. were parties to, and executed the indenture. B., previous to the date of the assignment, had drawn and indorsed several promissory notes for A's accommodation, which were due and protested, but not paid within three months from the date of the assignment; and, subsequent to that period, B., C., and D. by indenture assigned the trust estate to E. and F. upon the trusts of the indenture of *March* 28th, 1823. B., on the 23d of *June*, 1823, went to the office of his counsel, and there in his presence, and that of two of his students, executed one of three general releases, prepared by the counsel of A., at the time of preparing the original assignment, and delivered to each assignee. To the execution of the release one of the students was a subscribing witness; but B., instead of delivering the release to any one, put it in his pocket, and left the office with it in his possession. A., who left *Philadelphia* about the 17th of *April*, 1823, and went to *New Orleans*, returned on *Sunday*, the 30th of *June*, 1823, and on the following day the release was tendered to him on behalf of B., but he refused to receive it, and it was restored to the possession of, and remained with B.: *Held*, that there was sufficient evidence for the jury to find that the release of B. was delivered, and that he was entitled to recover from E. and F. in an action for money had and received, the amount of the notes he had drawn and indorsed for the accommodation of A., having paid the same before he brought his action, though he had not paid them before he executed the release.

THIS was a writ of error to the District Court for the city and county of *Philadelphia*.

The action in the court below was *assumpsit* for money had and received by *Edward Tuttle* against *Steel* and *Williams*, the plaintiffs in error, and was entered by agreement bearing date and filed on the 10th of *September*, 1824, to *September* Term, 1824. At the trial, it appeared from the evidence on the part of the plaintiff, that by indenture bearing date the 28th of *March*, 1823, *Thomas Williams* made an assignment of all his estate to *Edward Tuttle*, *Benjamin Allen*, and *Enoch Mudge*, in trust, in the first

* For this case the Reporters are indebted to E. D. Ingraham, Esq.

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place, and before any other debts due, or which may be due by the said *Thomas Williams*, to any person whatsoever, fully to pay and satisfy *Edward Tuttle*, or his assigns, for any claim he now has, or hereafter may have, on the said *Thomas Williams*, for any debt due to him, and to indemnify the said *Edward Tuttle* against any and every responsibility he is or may be under, for or on account of any promissory notes given or indorsed by him for the use or benefit or advantage of the said *Thomas Williams*." It was also provided, "that no one of the creditors of the said *Thomas Williams*, nor should any one having claims on him, have or receive, take, or enjoy, any part of the property, or the proceeds thereof thereby assigned and transferred to the said *Tuttle, Allen, and Mudge*, unless such creditor or person having such claim should within three months after the execution of the said assignment, and notice thereof in two of the daily newspapers of the city of *Philadelphia*, make, execute, and deliver to the said *Thomas Williams* a full and complete release of all and every claim and demand, action or cause of action, existing before the execution of the said assignment." And for the purpose of enabling the assignees to execute the trusts created by the assignment, and to collect and obtain all the property, &c. assigned, *Thomas Williams*, the assignor, constituted the assignees his attorneys in the premises, giving them, and the survivor of them, full power to do all acts and things which might be necessary and requisite in the premises, and covenanted to ratify all their acts. The indenture was executed by *Thomas Williams*, and also by the assignees, each one having sealed and delivered it.

On the 2d of *July*, 1822, *Edward Tuttle, Benjamin Allen, and Enoch Mudge*, by indenture indorsed on the assignment of *March* 28th, 1823, assigned the trust property to *Thomas Steel* and *Samuel Williams*, in trust to execute the trusts mentioned and set forth in the indenture of the 28th of *March*, 1823. The consideration of the assignment to *Steel* and *Williams* was expressed to be, their "having agreed to take upon themselves the performance of the trusts mentioned and set forth in the assignment of *Thomas Williams* of the date of *March* 28th, 1823, and of the sum of one dollar."

Previous to the 23d of *March*, 1823, *Edward Tuttle* had lent to *Thomas Williams*, his promissory note, dated the 10th of *October*, 1822, at four months, for five hundred and thirty-five dollars and forty cents, drawn in favour of *Williams*, and his promissory note, dated the 12th of *October*, 1822, at four months, for five hundred and twenty-eight dollars and ninety-eight cents, drawn in favour of *Kinsman* and *Wright*. These two notes were given by *Tuttle* for the accommodation of *Williams*, who in his receipt given for them to *Tuttle* promised to provide funds to take them up at maturity, but neglected or failed so to do. In addition to the last mentioned notes, *Tuttle* had indorsed *Williams's* notes, dated the 11th of *November*, 1822, at four months, for four hun-

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dred and fifty-seven dollars and seventy-eight cents, and the 7th of *December*, 1822, at four months, for four hundred and nineteen dollars and sixty-nine cents, which were indorsed to enable *Williams* to raise money for his own use, and he gave *Tuttle* two receipts for the sums raised by discounting them, stating them to have been discounted for his use. All these notes were discounted by *Stephen Girard* of the city of *Philadelphia*, banker, who was the holder of them, on the 28th of *March*, 1823.

It was also proved, that at the time the original assignment of the 28th of *March*, 1823, was drawn, three general releases, in accordance with the provision to that effect contained in it, were prepared by the counsel who prepared the assignment, who was the counsel of *Williams*, of which one was delivered to each of the first assignees, *Tuttle*, *Allen*, and *Mudge*. On the 23d of *June*, 1823, *Tuttle* went to the office of Mr. *Kittera*, his counsel, and executed in the presence of Mr. *Kittera*, and two of his students, one of whom was a subscribing witness, the release which had been prepared and delivered to him by the counsel of *Williams*. Previous to the execution of the release, Mr. *Kittera* filled two blanks in it with the words "twenty-third," and "*June*," thereby completing the date; and *Tuttle*, after executing it, put the release in his pocket, and left the office with it in his possession. The handwriting of the subscribing witness was proved, he being absent from the state.

Thomas Williams left *Philadelphia* for *New Orleans* a few days before the 17th of *April*, 1823, and did not return until the 30th of *June* of the same year, which was *Sunday*. On *Monday*, the 1st of *July*, 1823, the next day after *Williams's* arrival in *Philadelphia*, the agent of *Tuttle* called upon him, and tendered him the release executed by *Tuttle* on the 23d of *June*, 1823, but he refused to receive it. The agent received the release from *Tuttle* for the purpose of tendering it by his direction to *Williams* for acceptance, and upon his refusal returned it to *Tuttle*.

After the foregoing evidence on the part of the plaintiff had been given, his counsel offered to read the release, which was objected to on the part of the defendants, upon the ground that there had been no delivery of it; but the court overruled the objection, and permitted the release to be read to the jury, and the defendant tendered a bill of exceptions, which was sealed by the court.

It was admitted on the part of the plaintiff, that none of the notes discounted by *Stephen Girard*, and which had been drawn, and indorsed by *Tuttle* for the accommodation of *Thomas Williams*, were paid by *Tuttle* on the 1st of *July*, 1823, though they were due, and protested for non payment at the proper period; but suits having been brought, judgments were recovered against *Tuttle* by *Girard* upon the notes, executions issued, and the amounts of them all paid before the institution of the action against *Thomas Steel* and *Samuel Williams*.

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The defendants gave in evidence,—1. A general release executed by all the creditors claiming a benefit under the assignment of *Thomas Williams* of the 23d of *March*, 1823, except *Edward Tuttle*, within the period of three months from its date; being the release which had been delivered to *Enoch Mudge*, and had remained in his possession. 2. Certain advertisements in two of the daily newspapers in the city of *Philadelphia*, giving notice to creditors that a release was ready in the hands of *Mudge*, and that he was the acting assignee of *Thomas Williams*. 3. Three letters written in *February*, 1823, by *Tuttle* to *John D. Ferguson*, then at *New-Orleans*, stating his difficulties, and inclosing a draft upon *Ferguson* for 4,500 dollars, to be accepted by *Ferguson*, and held by him to cover the money and property of *Tuttle* in *Ferguson's* hands from attachment by any creditor of *Tuttle*. 4. The deposition of *Ferguson*, showing that the money and goods of *Tuttle*, in his hands, were short of the amount of 4,500 dollars drawn for.

Judge BARNES, before whom the cause was tried, charged the jury as follows:—

“Delivery is essential to a deed. There may be a delivery by words without acts, or by acts without words. I shall put the case to the jury upon the mere question of intention. If *Tuttle* went to Mr. *Kittera's* office for the purpose of executing a release according to the provisions of the assignment, and, with the full intent of absolutely releasing *Thomas Williams*, and taking under his assignment, executed the paper in question on the 23d of *June*, 1823, with the intention that such execution so made, without other or further act to be done, should be a complete and effectual release of *Thomas Williams*, no formal act of delivery was necessary; such execution under the circumstances amounting to a delivery in law. *Williams* was absent on a journey to *New-Orleans* until the last of *June*, or first of *July*: an actual delivery, therefore, could not be made or tendered to him on the 23d of *June*; nor is it necessary that there should have been such delivery, or tender, either to *Williams*, or to a third person for his use. The offer of the release to *Williams*, on his return from *New-Orleans*, was doing all that the law required of *Tuttle*; nor is the fact, that after the execution of the release, *Tuttle* took it, and kept possession of it until *Williams's* return on the first of *July*, 1823, otherwise material than as a circumstance for the jury, upon the question of *Tuttle's* intention at the time of its execution. If the execution of the release was intended to be complete, and was complete, on the 23d of *June*, *Tuttle* could not countermand it; and if incomplete, he was not in time on the first of *July* to complete it. *Tuttle* as assignee of *Williams* had authority to accept releases from *Williams's* creditors; and the very release in question was drafted by *Williams's* counsel, and delivered to *Tuttle* at the time of the assignment, and together with the assign-

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ment. The fact, that *Tuttle* was an assignee of *Williams*, I consider a material circumstance in the cause, and differs his case from that of an ordinary creditor, executing a release in a similar way. I put this part of the case to the jury on the question of fact. As to the notes discounted at *Girard's Bank*, and not paid by *Tuttle* on the *first of July*, 1823, the defendants object, that he is not entitled to a preference. I, however, instruct the jury in point of law, that he is entitled to a preference for those notes: the fund created by this assignment was for his indemnity against the consequences of responsibilities he had incurred for account of *Williams*, and he was entitled to the fund to relieve himself from them; it cannot be denied, that upon all those notes he had incurred, and was under complete legal responsibilities, which he had extinguished previous to bringing this action; being entitled to the fund, therefore, he may support the action to recover it."

To this charge the counsel for the defendants excepted, and the court sealed a bill of exceptions.

The errors assigned in this court were almost a literal copy of the charge of the court below, almost every word of the charge being excepted to; but in substance they may be reduced to two points, viz:—

1. That there was no delivery of the release of the 23d *June*, 1823, by *Tuttle*.

2. That *Tuttle* was not entitled to recover for the notes not paid on the *first of July*, 1823.

B. McIlvaine (and *Broome* was with him,) for the plaintiffs in error. The exceptions are to the whole of the charge. The legal right of *Tuttle* to recover, depended upon his having executed a release in such a manner as the law recognizes; and his *intention* to execute a release, without actually doing it, is not sufficient. *Pierpont v. Graham*, C. C. Penn. Dist. April, 1820, M. S. *Whart. Dig.* 179, No. 82. Where the grantee is absent, there must be a delivery to some third person for his use. As essential as sealing is to constitute a deed, delivery is no less so; though it may be to a third person, and *actual* or *verbal*. *Sheph. Touch.* 56, 57. *Ch. 4. Perk. s.* 137. So well settled is this principle, that putting a deed upon record does not amount to a delivery. *Maynard v. Maynard*, 10 *Mass. Rep.* 556. *Jackson v. Phipps*, 12 *Johns. Rep.* 421. The whole doctrine of delivery is to be found in *Verplank v. Sterry*, 12 *Johns. Rep.* 636, and the cases there cited. In the present case there was no delivery to the grantee *himself*, and if it be objected, that by his own act he had rendered it impossible, the answer is, that it might have been delivered to *Mudge* for his use; and by so doing, all chance of improper dealing with it, as circumstances might induce him, would have been avoided. *Tuttle*, however, kept it in his own pocket, and in his own power; and unless such a course be discountenanced by the courts, fraud will be the necessary consequence. In this case the

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strong objection is, that *Tuttle* created a paper to be used or not, as occasion required.

There was no discussion, or argument, as to the right of *Tuttle* to recover, founded upon the objection that the notes were unpaid on the *first of July*, 1823.

Ingraham, for the defendant in error. The release of *Tuttle* bore upon its face all the marks of a deed regularly executed. It had a seal, the signature of *Tuttle*, and of a witness; in whose presence it was stated in the usual terms to have been sealed and delivered. A foundation was laid for its going to the jury, by proof of the circumstances under which the three releases were prepared, and by proving the hand-writing of the subscribing witness, who was absent. This proof was alone sufficient to submit the deed to the jury, and from it, and the rest of the testimony, they had a right to presume a delivery, the essential ingredient of which is the *intention* of the party, without which, neither words nor acts, however solemn, are binding upon a jury. The error of the argument on the opposite side, consists in supposing, that the jury had no right, from facts proved, to presume the delivery of a deed. But the law is not so; the question properly being, whether the evidence is sufficient to go to the jury at all, for if there be no subscribing witness, the jury may infer the delivery from proof of the hand-writing of the grantor. Formal delivery is never required to be proved; but any act evincing the intention is sufficient. *Goodrich v. Walker*, 1 *Johns. Ca.* 250; and even words alone have been held sufficient, as being evidence of intention; nor is the doctrine new, that from the circumstances attending a particular case, a jury have a right to presume the delivery of a deed. *Goodright v. Straphan*, *Cowp.* 210. *Evans v. Evans*, 3 *Yeates*, 507; the last of which affords the strongest possible illustration of the principle. In *Shelton's Case*, *Cro. Eliz.* 7, a deed was sealed in the presence of divers, and of the grantee himself, but not delivered, nor did the grantee take it, but it was left behind in the same place, yet it was held to be a good delivery in law. And in *Pigott v. Holloway*, 1 *Bin.* 436, the witness said, he knew nothing of the execution of the deed, but that his name was subscribed to it in his own hand-writing, and from that, and other circumstances, he drew the conclusion that he must have witnessed its execution; the jury presumed a delivery in that case, though, as in this, there was an effort made to prevent their passing upon the question at all; the objection there, as here, being, that the execution was not sufficiently proved to go to the jury. The case of *Denn v. Mason*, 1 *Coxe's N. J. Rep.* 10, is very similar to *Pigott v. Holloway*. The presence of the grantee was not deemed necessary in *Smith v. The Bank of Washington*, 5 *Serg. & Rawle*, 318.

[TILGHMAN, C. J. Is there any case in which it has been left to a jury to presume a delivery, where the grantor retained the cus-

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tody of the deed himself; because in the last case cited it was delivered to the cashier for the daughter's use?]

The case of *Gardner v. Collins*, tried before Judge STORY, in 1824, in the Circuit Court, (since reported, 3 *Mason's Rep.* 398,) involved the very point; and though one of the grantors retained the custody of the deed, and the grantee was not present, nor any one on his behalf, yet the jury, upon its being left to them as a question of fact, presumed a delivery. But there is no occasion to go so far to support the release in this case; for *Tuttle* was, as assignee, the attorney of *Williams*, by express appointment authorized "to do all acts necessary in the premises," one of the most essential of which, for *Williams's* interest, was the acceptance of a release to him. If this view of the case be correct, the charge was too favourable to the defendants below; for the question was put to the jury, as to the intention of *Tuttle* in such a way, as to place the *bona fides* of any secret view he *might* have had in the transaction, too exclusively, perhaps, before them. The true view of the question was, could *Tuttle* have got rid of this release, after executing it in the presence of three witnesses, one of whom subscribed the paper, the existence of which was known also to the counsel who prepared it? He certainly could not be heard to say, there was no execution, as against any one to be benefited by his act. Lord ELDON, (19 *Ves.* 295,) cites the opinion of Lord MANSFIELD, that where one has put his name to a sealed paper, he is estopped from denying its delivery. *Pierpont v. Graham* has no bearing whatever on this case. The question there was, whether the creditor was entitled to relief in equity, having in proper time offered to execute a release which the trustee had promised to have prepared, but which was not prepared; no question certainly as to execution, could arise in relation to a paper which never had existence; and the creditor clearly could not found an equity upon his own *laches*, it being *his* duty to prepare and execute the release, if he wished the benefit of it; and his own fault if he let the time pass by without executing any release at all.

The opinion of the court was delivered by

DUNCAN, J. The only material matter in this cause is, whether there was any evidence of a delivery of the release from *Tuttle* to *Williams*, before the expiration of three months from the date of his assignment. The assignment was dated *March*, 28th 1823; and the provision was, that none of the creditors "should have or receive any benefit or advantage under the assignment, unless within *three* months after its execution, and notice thereof for *thirty* days in two of the daily papers of the city of *Philadelphia*, they executed and delivered a complete release of all demands, &c. to *Williams*, the assignor." The assignees were *Edward Tuttle*, the defendant in error, *Enoch Mudge*, and *Benjamin Allen*, who were parties to, and executed the instrument.

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The evidence of delivery, as stated in the paper book, is, that when the assignment was made, there were also *three* releases prepared by the counsel who drew it, one of which was delivered to each of the assignees; that *Tuttle* executed the release which was in his possession on the 23d of *June*, 1823, in the office of *Mr. Kittera*, and two of his students, and after the execution of it, put it into his pocket, and went away with it in his possession; that *Williams* left the city of *Philadelphia* for *New-Orleans*, a few days before the 17th of *April*, 1823, and did not return until *Sunday* the 30th of *June* following; that the said release was offered on behalf of *Tuttle* to *Williams*, on the *first* of *July*, 1823, and the latter refused to accept it; that the person who offered it to *Williams* got it from *Tuttle* for that purpose, and after the refusal returned it to him. The release of all the creditors claiming under the assignment, except *Tuttle*, was executed within the three months, and delivered to *Mudge*, with whom it remained. Notice was given within the *thirty* days, in the terms prescribed by the assignment, by the terms of which, *Tuttle* was the first preferred creditor, but he had not, on the *first* of *July*, 1823, paid the notes which were indorsed by him, and discounted by *Williams* at *Girard's Bank*. The part of the charge excepted to, is contained in the *second* specification of errors assigned; that there was no delivery of the release of the 23d *June*, 1823; and if there was error in that, the judgment must be reversed. The doctrine as to the proof of the delivery of deeds has much abated in its rigor of late years. Delivery is essential, but it is a matter of fact to be decided by the jury. The court may decide, and reject the deed if the proof be altogether defective; but they may, and most frequently do, leave it to the jury. *Comm. of Berks Co. v. Ross*, 3 *Binn.* 539. At one time it was supposed that a deed could not be good without subscribing witnesses, because the delivery could only be proved by a witness who saw it delivered; but there is no general rule which has so many exceptions as this; for if there be no subscribing witnesses, the hand-writing of the grantor may be proved; or if the subscribing witnesses are dead, or cannot be found, are interested, become infamous, insane, or blind, proof of this hand-writing will be sufficient. The reasoning of the Chief Justice in *Long v. Ramsay*, 1 *Serg. & Rawle*, 72, is conclusive. He observes, "that subscribing witnesses of late are not necessary; it is enough if there was a sealing and delivery, and of that the jury were to judge, and upon proof of the hand-writing of the obligor, they may presume the sealing and delivery." The great difficulty in this case arose from the grantor keeping the deed in his possession; but in deciding questions of evidence, we must look to the subject matter, the situation of *the parties*, and the object of the deed. The rule has been relaxed to suit the convenience of mankind. Rules of evidence are continually accommodating themselves to the exigencies of society, and in nothing is this more re-

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markable, as we have stated, than in the case of proof of deeds. What is now evidence of delivery, would not have been so fifty years ago. The jury are judges of the fact, of what is probable, and make their own deduction as to the fact of delivery. But even in days of the extreme rigor, no particular form of words or acts was required; for a deed might be delivered to the party himself, or to some stranger, for his use, without his authority; his assent precedent, or assent subsequent, was sufficient. In *Shelton's Case*, (*Oro. Eliz. 7.*) the deed was sealed in the presence of the grantee, but not delivered, nor did the grantee take it, but it was left behind the parties in the same place, yet in the opinion of all the justices, it was a good grant, for the parties came for that purpose, and performed all that was requisite for the perfecting it, except an actual delivery. So in *Alford & Lea's Case* (2 *Leon. 110.*) *Alford* brought debt upon a bond against *Lea*, and the case was, that the parties were bound one to the other, upon condition to stand to the award of B. and C., who awarded, that the said *Lea*, before such a feast, should make a release to *Alford*, but no place was assigned where the release should be delivered to the plaintiff. *Lea*, before the said feast, sealed a release according to the award, and delivered the same to one *Pine*, to the use of the plaintiff, who delivered it to one *Mason*, one of the servants of *Alford*, the plaintiff, who, two or three days after, offered it to *Alford*, who refused to receive it, but it was held, that the award upon this matter was well performed, notwithstanding the refusal of *Alford*. So *Tawe's Case*, *Dyer*, 167, A. enseals *quoddam scriptum obligat.* and delivered the same to one C. to deliver it to the obligee, who delivered it accordingly as the deed of A.; the obligee refused to receive it, but afterwards got the obligation, and recovered upon it. If a man throws a writing on a table, and says nothing, and the other party take it up, this does not amount to a delivery, unless it be found that he put it there with an intention to deliver it as his deed. *Chamberlain & Staunton's Case*, 1 *Leon. 140.* *Owen*, 45. The question was fairly left to the jury, whether the release was executed with a full intent to come in under the assignment, or with a lurking design on the part of *Tuttle* to use it, or not to use it, according to circumstances. The deed purported to be sealed and delivered, and from that alone the jury might presume, and ought to have presumed a delivery. The circumstance of his keeping the release, was very different from the case of an obligor keeping the bond, for that would be inconsistent with a delivery. There was no one in this case to deliver the release to; for though *Williams* had bound himself, under his hand and seal, to receive the release, he went to *New Orleans*; so that it could not be delivered to him, after its execution, within the three months; it was offered to him as soon as he returned, which was a few days after the time had elapsed, and he refused to receive it. The releases, by the terms of assignment, were to be delivered to one of the as-

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signees; each one had authority to receive them; forms were left in their hands by *Williams's* direction for this purpose: the releases of the other creditors were delivered to *Mudge*, one of the assignees, whose own release must have been delivered to himself, and kept by himself; *Tuttle* was a proper recipient of the release under the assignment, at least, as proper as *Mudge*. If there is a circumstance by which the will of the obligor appears that it should be delivered, and the obligee agrees to receive it, and the obligor considers and treats it as a deed delivered, a circumstance by which it shall be known that he treats it as his deed, without condition or explanation, it will be sufficient, and from it a jury may presume a delivery. By the trust deed, *Williams* agreed to receive the release of *Tuttle*, and that too, under his hand and seal. While the old rule was in force, that none but the witnesses could prove the fact of sealing and delivery, still, when they did not appear, upon being subpoenaed, and the party produced an indorsement upon the deed, reciting, that if he paid such a sum, the deed should be void, and acknowledging the said sum was not paid; this acknowledgment was held proof of the deed. *Dillon v. Crawley*, 12 Mod. Rep. 500. If any circumstantial evidence could prove a sealing and delivery, nothing could be stronger than the circumstances of this case, or better presumptive evidence to a jury of the fact of delivery, and accordingly the jury have found, *that Tuttle did bona fide* intend by what he had done, to execute the release, and considered it, and treated it, as a release. If he had brought an action against *Williams* for his original debt, *Williams* could have set up this instrument as a release; he could have proved its execution by *Tuttle*, who would not have been heard, against this public and notorious execution, to allege a mental reservation; and it is not an immaterial circumstance, that immediately on *Williams's* return, the release was offered to him; and thereby acting, as he did, in the double relation of trustee and creditor, *Tuttle* would be estopped to deny it; and it ought to be presumed to have been left in his custody by mutual consent. The proof would be on *Williams* to show that this deed, attested by two witnesses, as a deed sealed and delivered in their presence, was not the deed of *Tuttle*; to prove that there was no delivery, and that it was so understood at the time. An act so public and authentic as this, *could not* be qualified by any secret mental reservation. Whatever may have been the fact as to the custody of the deed, I do not think that it can alter its operation, provided it was duly delivered in the first instance, so as to become valid in law. The inquiry into the subsequent history of the release tends to confirm the facts of sealing and delivery; for immediately upon the return of *Williams*, the release was offered to him, not by redelivery, or recreation, but as a deed delivered on the day it bore date. In *Goodrich v. Walker*, 1 Johns. Ca. 550, and *Soubervie*

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v. *Arden*, 1 *Johns. Cha. Rep.* 240, it was held, that a *formal* delivery was not essential, if there be any act evincing the intent.

I am therefore of opinion, that under the circumstances of this case, and, keeping in view the particular situation of the parties, and the public, authenticated execution of this paper, it was binding on *Tuttle*, and consequently a release delivered within three months. The charge with respect to the notes discounted at *Girard's* Bank was quite right; and in the main, the plaintiffs in error had no just reason to complain of the instruction given to the jury.

Judgment affirmed.

ROGERS and HUSTON, Justices, came upon the Bench after the cause was argued, and therefore gave no opinion.

END OF MARCH TERM, 1827—EASTERN DISTRICT.

APPENDIX.

[SUNBURY, JUNE, 1826.]

MAUS'S Lessee *against* MONTGOMERY.

IN ERROR.

In ejectment between persons claiming under different locations, the defendant may give in evidence a lease made by his predecessor at a particular time, to show a pursuit of title and improvements made, and known to the plaintiff before he purchased.

In ejectment for a tract of land overflowed in part by a mill-dam, the owner of the mill situate on another tract is a witness, though it is alleged that the party against whom he is called will, in case of success, sue him for a nuisance: because the verdict here would not be evidence in such action.

The owner of a lottery application of the 3d of *April*, 1769, precisely descriptive and lower in number, has a right to a survey, if obtained within a reasonable time, and mere lapse of time less than three years will not take away this right.

The court ought not to be asked to state to the jury, as facts, matters which are disputed in the evidence, and ought to be decided by the jury.

Whether an application is descriptive of land, the jury are to decide.

WRIT of error to the Court of Common Pleas of *Columbia* county.

The opinion of the court was delivered by

HUSTON, J. The plaintiff here, who was also plaintiff below, *Philip Maus*, claimed on a location, dated the 3d of *April*, 1769, No. 2297, to *Morris Turner*, for three hundred acres of land in the forks of *Mahoning* creek, about two miles from the east branch of *Susquehanna*, and produced a draught of a survey in *October*, 1769, but which had not been returned into the surveyor general's office until 1794. This survey began about a mile from the river, and extended up *Mahoning* creek, including a narrow strip of land on each side of the creek to the forks, included ten or fifteen acres of land which lay in the forks of *Mahoning*; but the great mass of the survey lay below the forks. *Morris Turner* conveyed to *B. Lightfoot* in *May*, 1770, and he, *Lightfoot*, conveyed to *P. Maus* in 1794. *Maus* procured the survey to be returned, but

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no possession was ever had on this title; or, if there were proof of a temporary possession by *Morris Turner*, this was contradicted by the testimony of other witnesses.

The defendant claimed under an application, also dated the 3d of *April*, 1769, No. 45th, in the name of *Alexander M'Donald*, for three hundred acres, on the north side of the north branch of of *Susquehanna*, called *Mahoning*, adjoining Colonel *Francis's* land, and about twelve miles from Fort *Augusta*. The plaintiff had brought a copy of the original application filed in the office, which differed slightly from the entry thereof in the surveyor general's book; but the difference was not of material effect. The defendant alleged, that the survey now returned for *Morris Turner* was in fact made for *M'Donald*; and, to prove it, produced a return of a survey of an adjoining tract in the name of *John Botts*, made in *June*, 1770, and returned in *January*, 1771. This survey called for *A. M'Donald*, as having surveyed adjoining to it, and on the land in question, in *September*, 1771. *M'Donald* entered a *caveat* "against the acceptance of a survey of a tract of land on *Mahoning* creek, on the north-east branch of the *Susquehanna* river for *Morris Turner*, by virtue of his application, No. 2297, alleging that he hath a prior application for the same land." A day of hearing was appointed, but nothing further was done on it until 1794, when *Maus* and *Montgomery* became owners of the contending applications, and there was a decision of the Board of Property in favour of *Maus*.

M'Donald having entered his *caveat*, proceeded to take possession of the land; and in 1772 made a lease of it to *James Semple*. When this lease was offered in evidence by the defendants, the plaintiffs objected to it. The defendants stated it would be followed by proof that possession was taken under it, and kept to this hour, accompanied with *bona fide* and very valuable improvements. The plaintiff's counsel requested the court, that the defendant's counsel might state for what purpose it was offered. The defendant replied, "It is offered to show an active and diligent pursuit of our claim to the land, and for all other competent purposes." The testimony was admitted, and a bill of exceptions taken.

The counsel for the plaintiff cited 2 *Smith*, 180. *Lessee of Pigou v. Neville*, 4 *Dall.* 121, *Calhoun v. Dunning*, 3 *Yeates*, 580, *Eddy v. Faulkner*,—to prove that where a descriptive warrant is delivered and returned, a subsequent warrant or settlement gives no title.

The answer was, that the plaintiff's location is not descriptive of the land in question; that it is disputed, and can only be decided by the jury, for whom the survey was made; that it clearly was not returned, when the defendant entered and made his improvements; and that the defendant did not enter on a subsequent war-

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rant, but on a location of the same date with the plaintiff's, and which, being of a lower number, had preference to the defendant's description of the land.

In fact, under the idea of an alleged abandonment by the plaintiff, or of protection to the defendant by the statute of limitations, or pretence that the plaintiff's survey was not made on the ground, and so no notice to the defendant, the rule laid down in the cases cited has in practice been much relaxed, if not wholly abrogated; but, admitting it in the fullest extent, it never embraced this case. The plaintiff's survey was not laid *in the forks of Mahoning*; it was *not returned*. The defendant alleged his location was precisely descriptive of the land, and alleged the survey was actually made for himself. The matters disputed were matters of fact, which the jury alone could decide. The court could not assume that the allegations of the plaintiff's were true, for there was contradictory evidence on every fact in the cause, and, above all, the defendant did not claim by title subsequent to the plaintiff, but under one which he alleged had preference, being a lower number. His labour was not as an improvement, and to be held by improvement, but as an owner of an office title on his own land. He was not a stranger claiming subsequent to *Turner's* survey, or alleged owners claiming from them. But it is said it was also admitted for all other *competent* purposes, and so it ought to have been. If admitted *for all purposes*, a doubt might have arisen. There was one other purpose for which it was competent. *Maus* purchased in 1794. It was competent to prove that he actually knew of and had seen *Montgomery's* fields and orchards, and house, barn, and mill, before he purchased.

David Montgomery now owns the tract which was Colonel *Francis's*,—on this a mill had been built in 1773, which, after passing through several owners, is General *Montgomery's*. The dam of this mill occasions the water to stand in ordinary times at some depth on a part of the tract in question, and at high water to overflow some of the cleared land. It was in proof it had done so more than thirty years before *D. Montgomery* bought the mill, and more than fifty years before the trial. But the plaintiff alleged that if he recovered, he having been out of possession all that time, could support suit against *D. Montgomery* for this nuisance; whereas *J. Montgomery*, the defendant, had acquiesced so long that she was barred by lapse of time. On this ground, *D. Montgomery* was objected to, as being an incompetent witness, but the court admitted him, and this formed the second bill of exceptions.

Without deciding whether *D. Montgomery* can or cannot keep his dam, at the height at which it has stood for fifty years, against the plaintiff, who did not allege that he had ever given notice to any owner of the mill, (and, if necessary, I see no difficulty in deciding it,) *D. Montgomery* was still a witness. He had no interest in this cause. The verdict in this suit would not affect him; and that

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he might by possibility be hereafter liable to an action on the case, for a matter no way connected with the title of parties to this suit, would not exclude him. It is only where the verdict could be given in evidence in the suit to be brought. Where there is an immediate liability, in consequence of some privity between the party and witness offered, that liability to an action excludes, as in case of drawer or indorser,—grantor with warranty, and grantee, &c. See *Phillips on Evidence*, 42 and 56, in notes, and the cases there cited.

There were two other bills of exception, which were very properly passed over slightly. There was nothing in either of them. There was also an exception to the charge of the court.

After stating the titles of the plaintiff and defendant, and their evidence, the judge said, “If the defendant’s warrant is descriptive, it being the fortunate number in the lottery, (the lowest number,) the defendant was entitled to have a survey made for him, and equity will consider that as done which ought to have been done. The survey made shall be for the defendant, if he was by law entitled to have it.”

The rules which have been adopted, and long adhered to, respecting these lottery orders, and, to a certain extent, respecting warrants, are to be found in our printed reports. I shall content myself with referring to *McKinney v. Houser*, 2 *Smith’s Laws*, 190; to *Duncan & Curry*, 3 *Binney*, 14, and to *Lauman & Thomas*, 4 *Binn.* 58. These have become land-marks; the variety of facts, in different cases, may occasion, sometimes, a little difficulty in their application, but the law as laid down in those cases, could not be safely changed; nor, as I believe, would any change have made it better. The owner of an application precisely descriptive of the ground, and which, at the same time, was lower in number than any other application for the same ground, had a right to a survey of that ground, which could not be taken from him, if he pursued his claim; within what period he was bound to assert his claim, has not been precisely established; it will be found that *circumstances* have induced courts and juries to make different allowance in different cases; the breaking out of a war with the Indians, has suspended the time until peace was restored, and a reasonable time after; but I am safe in saying there is no case where mere lapse of time, unaccompanied by other circumstances, has been held to divest this right, in less than three years. I think a larger period has been generally allowed; and rightly, for in 1774, a notice was published by the Surveyor General, see 2 *Smith*, 188, 9, requiring those who had theretofore neglected, to attend in the several districts, and have their surveys made. Admitting, then, and it is more than ought to be admitted, that *McDonald* did not attend, or ask for a survey until 1771; if his application described the land in question, and was the lowest number, he was entitled to the survey made, or to have one made for himself; and having

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then entered a *caveat*, and taken possession and continued it, he is still so entitled, on this state of facts.

By our law and practice, either party may state to the court, certain positions which he contends to be law, and desire the court to deliver opinions on those points to the jury: within proper regulations, this might lead to uniformity, and certainty in the law. Hitherto, however, that has not, perhaps, been the effect. It has become too common for counsel to select a statement of facts, at least as favourable to his client as the case will warrant, and ask the court to state the law on such premises. Now this tends directly to mislead the jury, who are to consider the whole testimony, from it to collect the facts in the cause, and from the law, as applied thereto, return their verdict; it is useless, or worse, to put them on inquiring what the law would have been, if the facts had been otherwise. In the present case the plaintiff's counsel have attempted to go further; and here, as they admit, asked of the court to state to the jury as facts, matters about which there was great difference, nay, even contrariety of evidence, and which could only be decided by the jury. They have required the court to state that defendant's location is a removed one, or at most a vague one, and gave no title until surveyed.

It might, to a person who had not reflected on the subject, appear easy to write such a description of a tract of land, as that it must be applicable to one spot and no other. And so it is, when you have well known natural or artificial objects to which you can refer. But a man for the first time in a pathless wilderness, fifty miles from a house, ignorant of the names of the hills and creeks, or among hills and creeks which have not yet received names, will soon find it as difficult to describe definitely the tract he has selected, as it was to decide which tract he would select. The situation of his tract is pointed out by its relative situation to some known object. He takes for this object a known mountain or creek, or he gives a name to a mountain or creek not before known or designated by any name. You read his description, and if you know the object referred to, you know where the land lies. If you do not know the object referred to, you must have information, that is, a court and jury must have testimony, and of the truth of that testimony, or, if there is contradictory evidence of the weight of it, the jury are to decide. The variety in the description in these applications is as great as can be conceived. Some are certain, when you know the objects referred to: some are confused, and refer with no certainty to any precise object: some are contradictory, and some absurd. But is this such, or so clearly so, as that the court erred in this case?

The words "called *Mahoney*," in the defendant's application, convey no precise idea, unless you know what is called *Mahoning*; and at present, perhaps, there is nothing known by that precise name. But it also calls for Colonel *Francis's* land, about twelve

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miles from *Fort Augusta*, and from the north branch of *Susquehanna*. When witnesses tell you that on that branch *Francis* had lands, at that distance from the fort, and that a creek called *Mahoning* runs through *Francis's* lands, you may suppose the location precise, except that the name of the creek has been misunderstood as to the terminating syllable, or mis-spelled. When some witnesses swore that the creek, and only the creek, was called *Mahoning*, in 1769; that when people began to settle, the settlement was then called *Mahoning*; that at length the valley was called *Mahoning*, and in process of time the township was called by that name; and other witnesses say the whole valley and country was called *Mahoning* from the first; and a third says, that it was neither the creek nor country which had that name, but a large deer-lick, who is to decide? The jury, surely.

In *M'Kinney v. Houser*, (2 *Smith*, 190,) SMITH, Justice, tells the jury, "Whether the plaintiff's application is descriptive of the land in question, you only can decide." In *Duncan v. Curry*, the Chief Justice says, the jury are to decide, as a matter of fact, which of the two applications is the most descriptive of the land in question, or whether either is descriptive. I admit there are cases where it would seem to be assumed by the judge, and stated to the jury, that a warrant was vague. This last happened from a real uncertainty in the description, or from facts proved, or known, or admitted to be in a certain way. Thus, in *M'Kinney v. Houser*, Judge SMITH says, "The defendant's warrant was very vague;" and yet, a few minutes before, he had told the jury they only could decide whether the plaintiff's was so. But when we know the facts, this is not strange. The defendant's warrant called for a branch of *Spring* creek, adjoining land of *Reuben Haines*. Now, the court, bar, and jury knew that *Reuben Haines* once owned a large body of lands on the head branches of *Spring* creek. This was not proved, but admitted in the cause. On other proof, as if it had been in evidence that there was but one place at which a survey could have been made on a branch of *Spring* creek adjoining *Haines*, the same words would have made it a descriptive warrant. In fine, wherever there is an examination of witnesses, as there generally is in these cases, and the witnesses differ in their testimony, it must be a question for the jury, and the judge was right. It would have been error if he had taken this matter from the jury.

What I have said above will apply to all the other points. The plaintiff's counsel assumed a certain state of facts on which they asked the court to give opinions favourable to their client. The Judge, uniformly, instead of assuming their statement of facts to be true, left the facts to be ascertained by the jury; and stated the law as it would be if the facts were found one way, and as it would be if the facts were found another way; and, in doing so, did no injustice to the plaintiff. On more than one of the points

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proposed, there would not have been error, if the judge had charged more favourably for the defendant than he did. As all the other points made are resolvable to the principle depending on the exception to the charge, and the law is to be found in the cases above referred to, I will not repeat it.

Judgment affirmed.

[PITTSBURG, SEPTEMBER, 1826.]

FEAY *against* DECAMP.

IN ERROR.

On a demurrer to evidence, the court are to take every fact sworn to against the parts demurring to be true, and cannot consider any testimony impugning the truth of the testimony against him.

Where there is an agreement for the sale of lands, and possession delivered, and money paid, but not to the amount, and at the times agreed on, and the owner resumes the possession, and declares that he does so because the contract is at an end, and he is determined it shall be so, this is a disaffirmance of the contract, and the other party may recover back what he has paid.

WRIT of error to the Court of Common Pleas of *Westmoreland* county.

The opinion of the court was delivered by

HUSTON, J. *Levi Feay*, brought an action for money had and received against *George Decamp*, to recover back money paid on an article of agreement for the sale of a tract of land, on the ground that the contract was rescinded. The defendant, *Decamp*, demurred to the evidence, which was partly written, and partly parol. The only difficulty arose, perhaps, from the manner in which the evidence was brought before the Court of Common Pleas. In 1816, *Levi Feay*, had brought an action of covenant against *Decamp*, in which he insisted on the contract, and contended that it was not rescinded; that cause was brought to this court by writ of error; and decided, see 5 *Serg. & Rawle*, 323. To the record in that case, were attached certain depositions, and also the testimony of witnesses examined at the trial of that cause; some of those witnesses were dead or removed from the state, and their testimony was read as found attached to that record, and it would seem to have been considered that this testimony was part of the record, and I suppose on the ground that whoever gives a record in evidence, must give the whole record in evidence, the counsel for plaintiff read all the evidence given in that cause, as well by plaintiff as by defendant, which certainly he was not bound to do. He gave the record in evidence to show a trial between the same parties, in order to

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prove what a deceased witness swore at that trial; but the testimony given in the cause, though attached to the record, was not part of it, and he was not bound to read, nay could not legally read, such testimony in this trial, unless where the witness was dead or removed, or perhaps for some special purpose, as if one of defendant's witnesses now examined, stated facts differently from what he did then.

The whole evidence of both parties being thus inadvertently brought before court by plaintiff's counsel, the defendants demurred; and it has been insisted, this court, in deciding, is to consider the whole of this testimony, and decide according to the weight of it.

The demurrer to evidence has in modern times been extended to cases to which, perhaps, our ancestors thought it would not apply; to cases depending on parol evidence, and where contradictory evidence had been given. It seems to be settled, that it may be applied to such cases; it is, however, a dangerous experiment. "He who demurs to parol evidence, (says Chief Justice TILGHMAN,) engages in an uphill business; for every fact is taken *pro confesso*, which the jury might, with the least degree of propriety infer, from the evidence. The court is not nicely to weigh the evidence, and decide according to the turn of the balance; if that were the law, the trial by jury would be destroyed. It never was intended that by a demurrer to evidence, the court should become triers of the facts. This court has had occasion to consider this subject maturely." 3 *Serg. & Rawle*, 516. In that case the cause was decided on matters necessarily inferred from facts proved. In 7 *Serg. & Rawle*, 244, *Morrison v. Berkey*, it is said, "the demurrer to evidence is to be taken most strongly against him who demurs, and where it is to circumstantial evidence, his adversary may refuse to join in the demurrer, unless every fact is distinctly admitted on record, and every conclusion which the evidence offered, conduced to prove. So if the evidence conflict, the party demurring must admit that of his adversary to be true, so far as it conflicts with his own; where he does join, the court act on the same principles, and may draw any conclusion which a jury, justifiably, may draw."

So if the plaintiff in making out his case, calls several witnesses to prove the same transaction, some of whom prove certain facts or declarations, and others state the same facts or declarations more strongly for the plaintiff, the defendant, by demurring to the evidence, admits these latter to be true; and so the court must take it, though a jury might believe the less favourable statement to be true.

In the present case, *Decamp* had contracted by articles of agreement, dated 17th of *August*, 1815, to sell to *Feay* a tract of land, to make a deed on 1st *April*, then next, and then to give possession; "and doth at the present date give said *Feay* liberty to make

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necessaay improvements on the farm, such as repairing fences, putting in a field of grain, &c." *Feay* contracted to pay 4,000 dollars, as follows: 50 dollars in hand, 450 in a month, and 1,500 on first of next *April*, &c.

Feay paid the 50 and the 450 dollars, according to contract. On the 15th *December*, 1815, *Feay* leased the tract of land to *Armstrong* for two years, to commence on 1st *April*, 1816, and covenanted to give possession then. *Decamp* was the witness to this lease.

On the 3d of *April*, 1816, *Feay* and *Armstrong* came to *Decamp*. *Feay* had only 600 dollars; after some time they agreed by parol, that *Decamp* should receive that sum, and *Feay* was to pay 900, the balance of that instalment, on the 6th of *April*, and said if he did not, *Decamp* might keep the land and money both. The witness, *Bartlett*, says, "*Decamp* agreed to take the 600 dollars on the conditions plaintiff proposed, and on no other terms; that if the plaintiff did not pay him the balance of that payment on the 6th day of the same month, the contract was to be void: to which the plaintiff agreed." They further agreed, that *Armstrong* might move on the land, but if the money was not paid on the 8th, he was to go off on two days' notice. *Armstrong* moved on the land and proved, "that *Decamp* said, if *Feay* did not pay the money by such a time, he would spend every cent of the place, before he would let him have any benefit of either the land or the money that was paid." That after the 6th of *April* had passed, *Decamp* said he never would pay him the money, but would spend every cent of the place, before he would let him have any benefit of the land or money; this conversation took place about two or three weeks after *Armstrong* moved there; that *Decamp* took back the possession from *Armstrong*, the tenant of *Feay*.

Now it might be said, that *Decamp* had a right to take it back, and keep it until his money was paid; but the proof is, he took it back declaring *Feay* should never have it, on any terms; he would spend every cent of it before *Feay* should have any benefit of it. After this, in *August*, 1816, *Feay* made a tender of the remaining 900 dollars, in bank notes, which has been decided by this court not sufficient to entitle him to enforce the contract. In *December*, 1816, *Decamp* told *Feay* he would cheat him, *Feay*, out of the money and the land too; it has been argued, that these words were spoken in jest, or were never spoken; but the demurrer admits the truth of them; the court must take that to be true which is sworn to and admitted: if not admitted, a jury might not believe it. Another witness proves the same declarations by *Decamp* at another time, a year after. It was also proved by *Verner* that since this suit was instituted, he was present when *Decamp* offered *Feay* 500 acres of land at *French Creek*; *Feay* said he did not want that land, it was his money he wanted: *Decamp* said he might see how he would get his money; he would give him that

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land for the money he owed him. A declaration may be good evidence of a precedent debt; it is not pretended *Decamp* owed *Feay* any money, unless the contract in question was rescinded.

It seems *Decamp* thought he could refuse to comply with his contract; keep the land, and also keep the money he had received. That is not pretended now; the opinion delivered in this court, and reported 5 S. & R. 323, has settled that point, and to it I refer. It is well settled, that in many cases a purchaser may fail to obtain a decree for specific performance, and yet may support an action at law, *Sugd.* 183. And where the purchaser has paid part of the purchase money, and the seller does not complete the engagement, so that the contract is totally unexecuted, he, the purchaser, may affirm the agreement, by bringing an action for the non-performance of it, or he may elect to disaffirm the agreement *ab initio*, and bring an action for money had and received to his use. *Sugd.* 173, and cases there cited.

It has been objected, that because *Feay* insisted for some time on having the land, he cannot now consider the contract rescinded; that because he failed to pay at the time stipulated, he cannot recover the land, nor recover back the money paid; such is not the law; where the contract is not under seal, he may sue and declare in one count on the contract, to enforce the contract, and in another, to recover back the money paid, and this, though he failed to recover on the first count, by not offering to pay at the time. The ground on which the plaintiff failed in recovering on the special contract, was, that he did not call for the goods and pay for them within the time limited by the contract; and when he did call, and demanded, the defendants refused, because the demand was not made in season; the defendants then, by their own act, defeated the performance of the contract, and ought not to set it up as a pretext for holding the money advanced. 12 *Johns.* 274.

The conduct of the defendant can be viewed in no other light than a relinquishment of the contract; he refused to receive any more money from the plaintiff; he took back the possession of the premises which had been in possession of plaintiff: these acts are inconsistent with a claim to have the contract completed. Assumpsit lies to recover back money paid on a contract, which is put an end to, either when, by the terms of the contract it is left in the plaintiffs power to rescind it, or where the defendant assents to its being rescinded. 5 *Johns.* 85.

If one fail on his part, the other may consider the contract rescinded, and sue for money had and received, and recover what he has paid, or bring covenant and recover damages. 1 *Caines' Rep.* 27. 1 *Pow. Con.* 415. A tender is always for the benefit of the party to whom it is to be made, and may be waved or rendered unnecessary by him. An offer to comply with the contract on his own part, is generally necessary to support a suit, but is not always; to support assumpsit to recover back what has been paid, where

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one party resumed possession which has been delivered, and declares at the time, that he does so because the contract is at an end, and that he is determined it shall be so, the other party may take him at his word, consider it at an end, and recover back what he has paid. I would not be considered as saying, that every rash, inconsiderate declaration of one party, will enable the other to act on it a great length of time after; but solemn acts, repeated declarations, at long intervals, of uniform tenor, will justify it.

Whatever then we might think, sitting as a jury, and weighing all the evidence, as well for, as against the defendant, and even on that, I should incline to decide against him; I have no doubt on this cause as it comes before us, where his own admission by demurring to the evidence, and the rules of law on that subject compel us to take every fact sworn to against him to be true, and do not admit of our considering any testimony impugning the truth of the testimony against him.

The judgment of the Court of Common Pleas is reversed, and judgment for the plaintiff in error.

Upon a demurrer to evidence, the damages may be assessed by the principal jury, *conditionally*, before they are discharged; or which is the more usual way, may be assessed by another jury, upon a writ of inquiry, after the demurrer is determined. This must be done in the Common Pleas, to which this cause is remanded.

PITTSBURG, SEPTEMBER 12, 1826.]

SCULL and others, Administrators of IRWIN, *against*
The Executors of WALLACE.

IN ERROR.

In a suit against several administrators, one of the defendants, examined as a witness by the plaintiffs, without objection, cannot be permitted to state his belief that the defendants were indebted to the plaintiffs, founded on what the plaintiffs' testator had told him.

If there are several defendants administrators, and all plead the act of limitations, one, examined as a witness by the plaintiff, without objection, cannot be asked whether it was his intent to plead the act of limitations.

The declarations of the plaintiffs' testator, respecting the account with the defendants, are not evidence, unless to rebut a presumption arising from such testator having been an administrator of defendants intestate, and not bringing forward his account.

Query, whether an administrator may charge the estate by refusing to plead the act of limitations, although his co-administrator insist on pleading it. If, however, one stand neutral, the others may plead it.

Presumption of payment, founded on facts and circumstances, is matter of fact for the jury.

THIS cause was brought up by writ of error from the Court of Common Pleas of *Allegheny* county. It was brought by the ex-

(*Scull and others v. The Executors of Wallace.*)

ecutors of *George Wallace*, deceased, plaintiffs below, and defendants in error, against *John Scull*, and others, administrators of *William Irwin*, deceased, defendants below, and judgment was rendered for the plaintiffs below.

After argument by *Burke* and *Howard*, for the plaintiffs in error, and *Fetterman* and *Baldwin*, contra,

The opinion of the court was delivered by

TILGHMAN, C. J. This was an action for money lent, &c. brought by the executors of *George Wallace*, deceased, against the administrators of *William Irwin*, deceased. In the course of the trial several exceptions to evidence were taken by the counsel for the defendants, and several other exceptions to the charge of the court.

1. The first exception was to the following questions proposed by the plaintiffs to *John Scull*, one of the defendants, who was sworn as a witness without objection.—“What is your *belief* with regard to the state of the accounts between the estates of *Wallace* and *Irwin*.”—The witness answered, “My belief was, that the estate of *Irwin* was indebted to that of *Wallace*: my belief was founded on what Mr. *Wallace* told me.” The plaintiffs then asked the witness “whether he yet believed so.” This question was also objected to, but permitted by the court to be put. The answer was, “I believe the estate is indebted to *Wallace*. As to the amount, from what I heard *Wallace* say, I believe it to be large.” If the witness, who was one of the administrators of *Irwin*, had founded his belief on any knowledge derived from the examination of *Irwin*’s papers, I think the evidence would have been admissible; because an administrator can seldom have certain and personal knowledge of the affairs of his intestate, yet he may have sufficient information from papers not strictly evidence, to satisfy himself of the justice of a claim against the estate. Such information would justify him in paying a debt, and if he has declared his conviction or belief that a debt is due, I see not why it is not evidence; but in the present case, his *belief* was not evidence, because he had no knowledge but what was derived from *George Wallace*, the creditor, and to admit his belief, was the same as giving in evidence the assertions of the creditor himself. Although the questions put first to the witness, therefore, touching his belief, might not have been illegal in themselves, yet taken in conjunction with the answers, it appears that illegal evidence went to the jury; and when the answers were given, the court ought to have instructed the jury, that they were not evidence, and should be disregarded by them.

2. The next exception, was to another question put by the plaintiffs to *Scull*: “Was it your intent to plead the act of limitations?” This was an improper question; all the defendants had pleaded the act of limitations, and issue was joined on their pleas. If the attorney for the defendants had put in this plea for *Scull*,

(*Scull and others v. The Executors of Wallace.*)

without authority, he should have moved the court for leave to strike it out; but he shall not be permitted to say, that he did not intend to do what it appears by the record, that he has done.

3. The third exception was to the admission of evidence of the declarations of *George Wallace* to *Scull*, respecting the state of his account with the estate of *Irwin*. In general, such declarations certainly would be no evidence; but in one point of view, and for one purpose, they might be evidence. *George Wallace* was one of the administrators of *William Irwin*, and it was urged by the defendants, that he never brought forward his claim against *Irwin's* estate, which afforded a strong presumption that he knew he had no just claim; now to rebut this presumption, his declarations to *Scull*, that the estate of *Irwin* was indebted to him, were evidence; but they were no evidence to prove the quantum of his account, or even to prove that any part of the account was sustainable.

I have now gone through the minor points of the cause; the great question was on the act of limitations, and the charge of the court on that subject is to be considered. A very important point was raised by the defendant's counsel, which it is unnecessary to decide, because it does not fairly arise from the evidence. This point was, whether one administrator may charge the estate, by refusing to plead the act of limitations, although his co-administrator insist on pleading it. But it is clear enough, by the evidence, that *Mr. Scull*, although he did not desire to plead the act, and did not think it proper that it should be pleaded, was determined to act in such a manner as should leave the widow of *William Irwin* at liberty to avail the estate of that plea if she judged it right to do so. *Mr. M'Donald*, a witness for the plaintiff, swore, that *Scull* told him he had no doubt that the estate of *Irwin* was indebted to *Wallace*, but how much he could not tell. But in the same conversation, *Scull* observed that *Mrs. Irwin* was outrageous about *Wallace's* claim, and was determined to plead the statute of limitations. She said, she would not pay a cent of it. *Scull* said, he would leave the matter to her altogether, and would have nothing to do with it. And this was confirmed by *Scull*, in his own testimony, in the strongest terms. For, he swore, that he never had an idea of depriving the other administrators of the benefit of the act, if they chose to avail themselves of it. There was no contradiction in the evidence on this point, and the defendants' counsel had a right to the court's opinion, whether *Scull's* acknowledgment, taking it altogether, took the case out of the act of limitations. The law has been well settled by repeated decisions of this court. The principle is this. A slight acknowledgment of an existing debt is sufficient to take the case out of the statute; because the jury may, and ought to presume a new promise; but the acknowledgment is to be taken altogether, and if, on the whole, it is inconsistent with a new promise, no new promise shall be implied, and the statute shall bar. This is such plain common

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sense, that it is a wonder any opinion should ever have been held to the contrary. Now, to apply the law to the evidence in this case, Mr. *Scull's* confession considered *in toto*, is altogether inconsistent with a promise to pay; because he expressly declared that Mrs. *Irwin* was determined to plead the statute, and he would leave the matter to her, and would have nothing to do with it. I am at a loss for any argument to show the inconsistency of this acknowledgment with a promise to pay. The meaning is so plain, that it is impossible to misunderstand it. Had there been any thing contradictory, or even doubtful in the evidence, it would have been proper for the court to leave the matter to the jury; but every thing being certain, the charge ought to have been peremptory, that there was nothing to take the case out of the statute.

One other error was complained of, in the charge of the court. The defendants had not been able to give direct evidence of payment, but had proved many facts and circumstances, from which, in their opinion, payment might be presumed; and their counsel requested the court to charge the jury *that they were authorized to presume that the plaintiffs' claim had been paid*. This the court refused to do, but submitted the fact of payment to the jury, and, in my opinion, with great propriety. I take the meaning of the defendants' counsel to have been, that a *legal implication* of payment arose from the evidence; and if so, the jury were bound to find the payment. Now, certainly, no facts were given in evidence, from which *the law* would imply payment. But the defendants' counsel have said, in the argument before us, that their meaning was misapprehended, and they only desired the court to instruct the jury, that they were at liberty to exercise their judgment, and find in favour of the defendants, on the issue of payment, if they thought the evidence warranted it. I can only say, that if such was their meaning, it was not clearly expressed. In this part of the charge, therefore, there was no error. I am of opinion, on the whole, that the judgment should be reversed, and a *venire de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

[LANCASTER, MAY 24, 1824.]

GEBHART *against* SHINDLE and another, Executors of GEBHART.

IN ERROR.

It is no objection to the competency of a witness, that he has been found an habitual drunkard, in pursuance of the act of the 25th of *February*, 1819.

The widow of the testator is a witness for the executors in a suit brought by them, where she has no interest in the result.

In trover, by two executors, stating in one count a conversion in the testator's lifetime, and in the other a conversion since his decease, one of the executors, the plaintiff, cannot make himself a witness by paying all costs that have accrued, and depositing fifty dollars, and offering to deposite whatever the court should think sufficient to cover the costs that might accrue: he still has an interest in his commissions on the estate, and the costs may be recovered back.

It seems each case of this kind depends on its own peculiar circumstances.

ERROR to the Court of Common Pleas of *Lebanon* county.

This was an action of trover, brought by the defendants in error, the plaintiffs below, *Peter Shindle* and *Adam Ritsher*, executors of *George Gebhart*, deceased, against *George Gebhart*, to recover four bonds of fifty dollars each, payable by *John Steckbeck* to their testator, and by him assigned to the plaintiff in error, his nephew.

The point upon which the case turned was the validity of that assignment,—the executors alleging that the testator was not of sound mind, memory, and understanding when the assignment was made. The declaration contained two counts. The first count was for a trover and conversion *in the lifetime of testator*, and a count for a trover and conversion *since the death of testator*. The defendant pleaded the general issue. All the evidence given at the trial was of a trover and conversion in the testator's lifetime. The jury rendered a verdict in favour of the plaintiffs, and assessed the damages at six hundred and eighty-one dollars. At the trial, several exceptions were taken by the defendant to the admission of witnesses and to evidence, but were all subsequently abandoned, except the following:—

1. The admission of *John Steckbeck*, as a witness, who they alleged was incompetent, on the ground that he had been declared to be an habitual drunkard and trustees appointed to take care of his estate, under the act of assembly of the 25th of *February*, 1819.

2. To the admission of *Maria M. Gebhart*, the widow of the testator, on the ground of interest. She was received as a witness, after having first sworn that she had elected to take under the will of her husband, by which he bequeathed to her certain specific legacies in lieu of her dower.

3. The plaintiffs having paid all the costs that had accrued, and deposited fifty dollars to cover the costs that might accrue, and

(Gebhart v. Shindle and another.)

offered to deposit any further sum that the court would name, if that sum was not considered sufficient, in which deposit they desired to be entirely governed by the court,—offered *Peter Shindle*, one of the executors and a plaintiff in the suit, as a witness, to whose admission the defendant objected, which objection was overruled, and the defendants excepted.

Weidman and *Norris*, for the plaintiff in error. *John Steckbeck* having been declared an habitual drunkard, under the provisions of the act of the 25th of *February*, 1819, 7 *Sm. Laws*, 155, and his estate taken out of his hands and committed to trustees, the proceedings were in the nature of, and in effect a commission of lunacy, and rendered him incompetent. Drunkards are classed by Lord COKE, in his commentaries upon *Lyttleton, Co. Litt.* 247, among persons who are *non compos mentis*, of whom he says there are four sorts, one of which he enumerates to be “persons who by their own vitious acts deprive themselves of their memory and understanding, as he that is drunken.” Infants, lunatics, and persons who have not ordinary understanding, are not competent witnesses. It ought to have been proved to the court below that *Steckbeck* was a competent witness, and possessed of ordinary understanding; the record of his having been an habitual drunkard having been given in evidence to the court to support the objection. 10 *Johns. Rep.* 362. 1 *Harrison’s Chan.* 491.

2. The policy of the law, which excludes husband and wife in civil suits from being witnesses for or against each other is applicable here. It has been decided, in a libel for divorce brought by the husband, that the confessions of the wife cannot be given in evidence to prove the fact of adultery. *Phil. Evid.* 67. *Peake’s Evid. Appendix*, 57.

3. *Peter Shindle* was one of the plaintiffs in the suit, and liable for costs, and consequently had an interest in the event of the suit: he had, moreover, an interest in the money to be recovered in this suit, for the commissions to which he would be entitled as executor. The payment of the costs and the deposit, did not divest him of all interest in the suit. 1 *Binn.* 444. 7 *Serg. & Rawle*, 116 to 132. *Patton v. Ash*, 1 *Yeates*, 134.

J. A. Fisher, and *Fisher*, for the defendants in error. The first exception is to *Steckbeck’s* competency as a witness. Mr. Justice LAWRENCE, in laying down the law with respect to the competency of a witness, in *Jordaine v. Lashbrook*, 7 *Term Rep.* 610, (cited in *Phil. Ev.* 13,) says, “I find no rule less comprehensive than this, that all persons are admissible witnesses who have the use of their reason, and such religious belief as to feel the obligation of an oath, who have not been convicted of any infamous crime, and who are not influenced by interest.” In this case, it is not pretended that the witness was devoid of religious principles, or that he had been convicted of any offence which rendered him infamous, nor did he want sufficient understanding.

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It is admitted that persons who have not the use of their reason, as lunatics, &c., under the influence of their malady, are not competent witnesses. But even lunatics, and others who are subject to temporary fits of insanity, may be witnesses in their lucid intervals, if they have sufficiently recovered their understanding. *Phil Ev.* 14, 15. In cases where an objection is made to a witness on the ground of lunacy, &c., it is the province of the court to decide whether there is any evidence, and to ascertain the competency of the witness from personal observation, and interrogation. They have the witness before them, and can best judge of his mind and intelligence from his conduct and answers to questions propounded to him. This principle necessarily excludes persons from testifying who are besotted with intoxication *at the time* they are offered as witnesses, but does not extend to persons who may be addicted to hard drinking, but are, at the time they are offered, perfectly sober, and possessed of sufficient understanding and recollection to detail what has passed upon the subject to which they are called to testify with clearness and precision. *Hartford v. Palmer*, 16 *Johns.* 143. The act of assembly of the 25th of February, 1819, relative to habitual drunkards, does not disqualify them from being witnesses, nor deprive them of any of their other rights as citizens: it only places their estates in the hands of trustees: the only objects of the law being to prevent them from wasting their estates, and to preserve it for their families.

[The counsel were stopped by the court, in their answer to the second exception.]

As to the third exception, it is contended by the plaintiffs in error, that *Peter Shindle* was incompetent, on account of his liability for costs, and to commissions to which he would be entitled as one of the executors, on the money recovered by this suit. In this case the executors are not, and were not, liable to pay costs, the trover and conversion being in the life time of the testator. The law in *England* is well settled, that when the trover and conversion are in the life time of their testator, executors are not liable for costs, even when they are non-suited. 2 *Saunders*, 47, (*R.*) 1 *Salk.* 207. *plea.* 6. 3 *Levinz*, 60. 1 *Stra.* 682. But it may be objected that there are two counts in the declaration; true, but this we apprehend does not alter the case, the evidence given at the trial being only applicable *to the first count*; the case of *Cockeril v. Kynaston*, 4 *Term Rep.* 277, is directly in point, and this court having the judge's notes of all the evidence given at the trial before them, will satisfy themselves of that fact, and decide accordingly. If this is not the law, and not authority in this court, by which they will be governed in making up their opinion, still by the payment of all costs that had accrued, the deposit, and the offer to deposit any sum that the court would say should be deposited, if the sum deposited was not considered sufficient, and

(Gebhart v. Shindle and another.)

in which deposit they offered to be governed by the court, the witness was entirely divested of all interest, on the ground of liability for costs. Then as to the commissions to which he would be entitled on this money if recovered, this is not such an interest as will render a witness incompetent. For to exclude a witness on the ground of interest, there must be a direct and immediate interest, and not a possible or contingent one. The interest which an executor or administrator has, in money recovered for the estate of their testator, or intestate, is at most, a contingent interest, and not sufficient, even without a release, to exclude them as witnesses. The Orphans' Court, may, on the settlement of their accounts, allow it, or they may not; it is optional with that court. This has been expressly laid down as the law by Justice GIBSON, in the opinion delivered by him in *Ash, Administrator of Craig, v. Patton*, 3 Serg. & Rawle, 300. 6 Binn. 16.

The opinion of the court was delivered by

DUNCAN, J. The plaintiff in error has abandoned all the objections to this judgment, except the first, second, and third. The first is to the admission of *John Steckbeck*, as a witness, on the ground of incompetency; he having been found an habitual drunkard, in pursuance of the laws of this Commonwealth. It is contended, that the inquisition and proceedings incapacitate him *ipso facto*, from being received as a witness; that the proceeding is equivalent to a commission of lunacy. This is not so, his estate is taken out of his management, and committed; his person is not; the act of assembly intended nothing more. To render the witness incompetent, it must be shown that *at the time* of his examination, he was *non compos mentis*, deranged in mind, from some cause, the effect of liquor, or any other cause. No drunken man should be permitted to give evidence. But this never can apply to drinking men, even though incapable of managing their estates. Men of the brightest intellect have fallen victims to this vice, who, when the effect of hard drinking has subsided, possess in their sober moments, their understanding, if not in its full vigor, yet sufficiently unimpaired, to recollect, and to state the facts, where they do recollect, with clearness and intelligence. It was the policy of the law, to prevent habitual drunkards from wasting their estates, but it does not give them the protection granted to lunatics, as to exemption from punishment, nor deprive them of any of the other rights of citizens. If this was the case, instead of operating as a means of reformation, it would dispose them to drink. The point of inquiry is *the moment of examination*; is the witness then offered, so besotted in his understanding, as to be deprived of his intelligence? If he is, exclude him; if he be a hard drinker, an habitual drunkard, yet, if *at that time*, he is sober, and possessed of a sound mind, he is to be received. At the time this witness was offered, we are to take it for granted, he was in that state of mind.

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The second exception is to the admission of the widow of the testator. She had no interest in the cause, or in the question; she had a specific bequest which she elected to take, and had accepted; it could neither be diminished nor added to, be the cause gained or lost. But she is objected to on the score of policy of the law, which it is said, will not suffer the widow to give evidence relating to the estate. There is a recent desision, that, under particular circumstances, a wife divorced from the bonds of matrimony, has not been suffered to disclose certain transactions of the husband during the intermarriage; without saying, whether, in any case that rule would prevail here, I may say, it is novel. But that is not this case; here death has dissolved the marriage, and the testimony of a widow, free from interest, or releasing all interest, has been constantly received in questions respecting his estate, and even to prove his incapacity to dispose of his property. In the case of *Nathaniel Irish's* will, his widow, releasing her interest, was a witness against the will. This objection was not indeed made, though the cause was in the hands of very able counsel, and every question made, which was considered as tenable. The policy of the rule, excluding husband and wife from being witnesses for, or against, each other, is founded on the supposed bias arising from marriage, and the consideration that the interest of husband and wife is the same, or from the supposed union of persons. *Baker v. Dixie*, *Hardwicke's Cases*, 264. 1 *Black. Com.* 443. *Fenn v. Lewis*, 10 *Johns.* 44, or from the necessity of preserving the peace of families. Neither of these causes applied here. The union was dissolved by death, the legal policy of exclusion no longer existed. This exception likewise fails.

But the third exception, the plaintiff in error has supported, which is, that *Peter Shindle*, one of the plaintiffs, was received as a witness. He certainly would have been liable for costs; for in the second count in the declaration, the plaintiffs have laid both the possession to have been in them, and the conversion in their own time, and in such case, if the executor fails, he is clearly liable for costs. *Wilbraham v. Snow*, 2d *Wms. Saunders*, 47, *Note R.* So far as respected the costs, he would be interested; to divest himself of this interest, he paid all the costs that had accrued, and deposited fifty dollars to cover all costs that might accrue, and offered to deposite any further sum the court would direct. But here was another executor plaintiff; if there was a recovery against the defendant, there would be a recovery of all the costs, and for both executors; he had then a remaining subsisting interest. It is a rule of the common law, that a party to a suit, whether he has an interest in the thing, or is merely a trustee, is not a competent witness; but where the person is a mere trustee, or having an interest which he has parted with, there in our courts, the costs being paid and release, he may be received as a witness. This relaxation is liable to great abuse, and requires the utmost circumspection to

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prevent all the evils of introducing interested witnesses. In general the cases in which the party has been received, are when he has released every possible interest, and the costs have been paid, with an agreement on record, that in case of a recovery, they shall not be refunded. They have been paid, generally, not by the witness, but by the *cestuy que use*, and the court will expect the most satisfactory evidence of real divestment of interest, and actual arrangements between the nominal and real parties, if the costs be paid by the nominal party, that the real party will not refund them.

In the case of *Patton v. Ash, &c.* (7 *Serg. & Rawle*, 124,) the leading case of the admission of executors plaintiffs as witnesses,—*Ash*, previous to his admission as a witness, executed a release to the heirs of *Craig* of all claim to compensation by way of commissions, and paid to the prothonotary a sum of money sufficient for the payment of all costs that had accrued or might accrue, let the verdict be as it might; so that, in every event, the whole costs were paid by *Ash*, and he had agreed, that in no event was any part of the money to be refunded. Very different from *Ash's* state was the state of *Shindle*. He had entered into no engagement as to the absolute payment of the costs,—no agreement that in any event the costs were not to be refunded him. But, more than this, he had not released the claim to compensation by way of commission on the sum which might be recovered in this action; for though compensation is not made to executors under the name of commissions, yet the Orphans' Court, in making the allowance, are pretty generally governed by the amount of the estate, and it is always used as a measure of compensation. *Ash* had divested himself of all interest, actual or contingent; *Shindle* has not done so, and therefore was incompetent. There may be exceptions to the rule of admitting parties as witnesses, though they cannot be proved to be absolutely interested. These exceptions must be judged of from the circumstances in which each particular case stands. This executor had not stripped himself of all interest actual, certainly not of all contingent: it behoved him to do this before he could be received to testify; for where the rigid rule of the common law, in excluding all parties on the record, is relaxed to let in any party, the relaxation should only take place where it was very plain, that in no possible shape or form, in no event that could possibly happen, could he be in the smallest degree a gainer or loser. All possible interest should be divested. This man did not stand in that relation of perfect indifference in point of interest, and ought not to have been admitted, and for this reason the judgment is reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

GENERAL INDEX

TO THE

PRINCIPAL MATTERS IN THESE REPORTS.

ABANDONMENT.

See ACTUAL SETTLEMENT, 2. EVIDENCE, 101. INSURANCE, 1, 2, 28. LAND, 4, 9. SETTLEMENT, 4. WARRANT AND SURVEY, 29.

1. Of the doctrine of abandonment.

Watson v. Gilday. xi. 337

2. If the person under whom the defendant claims was living on the land in dispute, and holding it by actual settlement, at the time at which the warrant under which the plaintiff derives title was taken out, and the survey made, and the possession was continued, with some intervals, (during which no person was actually on the land,) down to the defendant, it is not error to instruct the jury, that these facts repel any general presumption of abandonment, and that, in the opinion of the court, the evidence does not establish an abandonment of the improvement.

Barton et al. v. Glasgo. xii. 149

ABATEMENT.

See BOND, 5. PLEADING, 59.

An action of trespass *vi et armis* for forcibly seizing a vessel and cargo on the high seas, abate by the death of the defendant before final judgment. *Nicholson v. Elton.* xiii. 414

ACCESSARY.

See INDICTMENT, 31, 36.

ACCOUNTING OFFICERS.

See FEES, *passim*.

ACCOUNT RENDER.

See ARBITRATION, 20, 44. AWARD, 24. JUSTICE OF THE PEACE, 33.

1. Where a voyage, after its commencement, became illegal in consequence of the act of congress of the 1st of May, 1810, which revived certain provisions of the act of the

1st of March, 1809, prohibiting intercourse between the *United States* and *Great Britain* and her dependencies, and the vessel was seized upon her arrival in this country, for a breach of that law, but the forfeiture was remitted on certain conditions, the defendant was supercargo, and part owner of the vessel and cargo,—was held to be accountable to the plaintiffs in account render, for the money which he received on account of the concern.

Newbold v. Sims. ii. 317

2. A general verdict for the plaintiff, in account render, does not conclude the defendant, as to the dates and sums mentioned in the declaration, but the whole matter is open to the investigation of the auditors, who are to make the proper charges, and allow the proper credits, without regard to the verdict of a jury. *Id.*

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3. Query, Whether an action of account render could be arbitrated prior to the act of the 20th of March, 1821. *Deal's Executors v. Deal.* vii.

201

4. But, if it could, the referees would first have decided whether the defendant was accountable, after which another proceedings should have been had for settlement of the account. They ought not to have treated it as an action of *assumpsit*. *Ibid.*

5. A blank in the declaration for account render, for the time during which the defendant acted as bailiff, is cured by an award of arbitrators, if the parties appeared before the arbitrators, and their proofs and allegations were heard. *Gray v. Wright.*

x. 227

6. After a judgment *quod computet*, in account render, entered by confes-

sion, upon a declaration averring that the defendant was the plaintiff's bailiff and receiver during a certain specified period, the plaintiff cannot amend his declaration by laying a different period. *Sweigart v. Lowmarter*. xiv. 200

7. Nor can the plaintiff, on the trial of the issues certified by the auditors, give evidence of the receipt of money by the defendant, prior to the time laid in the declaration. *Ibid*.
8. In account render by one partner against two, charging them as bailiffs and receivers, the plaintiff must show a joint liability on the part of the defendants to render an account to the plaintiff. *Whelen v. Watmough*. xv. 153

ACCOUNT STATED.

See PARTNERS, 4, 9.

The court may allow the jury to take out with them the statement of particular items of account by a party and calculations, but no item should be inserted, unless there has been some evidence given of it. *Frazier v. Funk*. xv. 26

ACKNOWLEDGMENT.

See EVIDENCE, 33. DEED, 1, 9, 10, 26. POWER OF ATTORNEY, 1.

1. The certificate of the acknowledgment of a deed, by a married woman, for the conveyance of her lands, under the act of the 24th February, 1770, ought to state substantially that she was separately examined, that she had a knowledge of the nature and consequences of the act she was about to perform, and that her will in the performance of it was free. Therefore a certificate, merely stating that she was of full age, and separately and apart examined, and the contents of the deed made known to her, without mentioning that she voluntarily consented to the execution of it, is insufficient. *Evans v. The Commonwealth*. iv. 272
2. The certificate of the acknowledgment of a deed by a married woman for the conveyance of her lands, should exhibit on the face of it, at least a substantial compliance with the provisions of the act of the 24th of February, 1770. Therefore, if a certificate state "that the husband and wife personally appeared before the magistrate, and acknowledged the indenture to be their act and deed, and desired the same to be recorded, they being of full age and by him examined apart, it is insuffi-

cient to pass the real estate of the wife. *Watson v. Mercer et al*. vi. 49

3. To make the deed of a married woman valid to bar her dower, it must appear from the certificate of the magistrate, before whom it was acknowledged that all the requisitions of the act of assembly have been substantially complied with. A certificate merely stating that *she was examined separate and apart from her husband, and acknowledged it to be her act and deed, is insufficient*. *Fowler v. McClurg et al*. vi. 143
4. An acknowledgment of a deed by husband and wife, in Washington county, Maryland, in which they resided, before A. B. and C. D. who were stated, in a certificate from the clerk of the court of the county, under his official seal, to be justices of the peace of that county, without stating that they were the *chief officers of the place*, or any proof being given that they were so, is not good within the act of the 24th of February, 1770. *Cassell v. Cooke*. viii. 268
5. The acknowledgment of a deed by a feme covert is not good, unless it be expressed in the certificate of the magistrate who took her acknowledgment, that the contents of the deed were made known to her. *Steele v. Thompson*. xiv. 84

ACTION.

- See ACT OF ASSEMBLY, 9, 12. ADMINISTRATOR, 6, 7, 8, 9, 17. ASSIGNMENT, 4. ASSUMPSIT, 2, 3, 6, 7, 10, 12, 13, 20. AUCTIONEER, 3, 4. AWARD, 4, 9, 10, 19, 22. BANKRUPT, 1. BILL OF LADING, 1. CONSTABLE, 1, 3. CORPORATION, 9, 10, 21, 24. COUNTY COMMISSIONER, 1, 2, 7. DAMAGES, 1, 2, 7, 8, 10. ERROR, 35. EVIDENCE, 73, 346, 354, 357, 362, 366. EXECUTORS AND ADMINISTRATORS, 10, 11. FORMER RECOVERY, 1, 2. JOINT SUIT, 1, 2, 3. JUSTICE, 5, 7, 12, 16, 20, 24, 30, 36, 39. INSOLVENTS, 6. LIEN, 6. PARTNERS, 9. RECOGNIZANCE, 12. SURETY, 1, 2, 3. TAVERN RECKONING, 1, 2. TRESPASS, PASSIM. TROVER, PASSIM. TRUSTEES, 1, 2. VENDOR AND VENDEE, 1, 2, 8, 10, 11, &c. WARRANTY, 1, 2, 3, 4.
1. The act of the 21st of March, 1806, was intended to provide a form of action for a plaintiff who sues in person, or by his agent, but does not prevent him from bringing *assumpsit*.

- sit, where that form of action is preferred. *Miles v. O'Hara.* i. 32
2. A. sells B. four hundred acres of land, and binds himself to procure a patent for the same, on the payment of the last instalment. B. sells to C. a part of the said land, and covenants to procure the patent on the reasonable request of C., and by the same instrument empowers C. to procure the patent from A., for which he is to be allowed a valuable consideration. B. cannot support an action of covenant against C. for not procuring a patent. *Barn-dollar v. Tate.* i. 160
 3. A complaint consisting partly of breach of contract and partly of misfeasance, in which the plea is not guilty, may be joined with trover. *Smith v. Rutherford.* ii. 358.
 4. Although the evidence proves a trespass, yet if there is a count in trover, the plaintiff may waive the trespass and recover in trover. *Ibid.*
 5. An action for rent by lessor against the lessee is transitory. So is covenant by the assignee of the reversion under the statute of 32 Hen. 8. c. 34; but debt by an assignee of the reversion is local. *Henwood v. Cheeseman.* iii. 500
 6. An action founded upon a transaction forbidden by a statute, cannot be maintained, although a penalty be imposed for violating the law, and it be not expressly declared that the contract is void. *Seidenbender v. Charles's Administrators.* iv. 151
 7. An action to recover a legacy charged upon real estate, cannot be supported against the devisee and terre-tenants of the land without an express promise to pay it. *Brown v. Furer.* iv. 213
 8. *It seems* that the action should be brought against the executor and terre-tenants, and the judgment should be so entered as to bind the land only, and not the persons of the defendants. *Ibid.*
 9. A. and B. being in possession as tenants in common of land, the title to which was contested, and to secure which it might be necessary to expend considerable sums of money, entered into an agreement by which B. covenanted to bear an equal proportion of the expenses incurred, or which might be incurred by A. in vindicating their title, or extinguishing adverse claims. A. having had the legal title conveyed to himself alone, it was held that he might maintain a suit for the recovery of B's moiety of the expense, without having previously conveyed to B. a moiety of the land; but as a court of chancery would compel A. to convey the legal estate before he could be permitted to recover the money which B. had agreed to pay in contemplation of obtaining a legal title, a court of law in *Pennsylvania*, will stay the execution, until a legal estate in a moiety of the land be conveyed to B. *Swearingen's Executors v. Pendleton's Executrix.* iv. 272
 10. A personal action may be sustained in the common law courts of *Pennsylvania*, for the recovery of legacies charged upon land. *It seems* that the executor should be made a party to the suit, or, at least, should have notice with liberty to appear and plead. *Gause v. Wiley.* *Ibid.* 509
 11. An action for the price of goods cannot be maintained before the term of credit has expired. *Girard v. Taggart.* v. 19
 12. The right of action for the breach of a parol contract for the sale of land, is in the executor of the vendee, and not in his devisee of the land itself. *Irwin v. Hamilton and Wife.* vi. 208
 13. When the action should be trespass, and when case. *Cotteral v. Cummins and another.* vi. 343
 14. An action for money had and received, will not lie for the price of sand, taken from a sand bar, to which both the plaintiff and defendant claim title, and sold by the defendant. *Baker v. Howell.* vi. 476
 15. A father may maintain an action on the case for the seduction of his minor daughter, *per quod servitium amisit*, though, at the time, she did not reside with him; provided she was subject to his control, and he was entitled to command her services. *Hernketh v. Barr.* viii. 36
 16. A party entitled to the transfer of the stock of an incorporated company, may maintain a special action on the case against those whose duty it is to permit a transfer to be made, and who refuse permission. *Morgan and another, Assignees of Wain, v. Bank of North America.* viii. 73
 17. If assignees for the benefit of creditors sell the goods which have been assigned to them, the action for the price of the goods should be in their own names; but if in the writ and declaration, they stile themselves assignees, it is mere surplusage, and

- does not affect their right of action. *Wilmarth and another v. Mountford and another.* viii. 124
18. A suit on a forfeited recognizance, conditioned for the party's appearance to answer on an indictment, is not a civil action. *Commonwealth v. Commissioners of Philadelphia county.* viii. 151
19. If a bond be given to ten obligees jointly, an action by seven of them only, when all are living, cannot be supported. *Sweigart v. Berk et al.* viii. 308
20. An action cannot be maintained to recover the prize drawn to a lottery ticket which has been lost, without previously giving or tendering an indemnity against all future claims founded upon it. *Snyder, for the use of Etter, v. Wolfey and another, surviving obligors of Hipple and Gish.* viii. 328
21. An action may be maintained on a sheriff's official bond, immediately after he refuses to make a levy on property pointed out to him by the plaintiff in the execution, without waiting till the return day of the writ. *Shannon et al. v. Commonwealth for the use of Lazarus.* viii. 444
22. Independently of the act of the 21st of March, 1806, an amicable action may be entered by attorney. *Cook and another v. Gilbert.* viii. 567
23. An action at law is maintainable in *Pennsylvania* on a decree of a court of equity in *Tennessee* for the payment of money. *Evans v. Tatem.* ix. 252
24. In such actions, the pleas of *nil debet* and *nul tiel record* are both bad on general demurrer. *Ibid.*
25. If the defendant mean to deny the existence of such decree, he may frame a deed to meet the averment of the decree in the declaration, and such plea must conclude to the contrary. *Ibid.*
26. On a contract by the defendant to deliver to the plaintiff, at the defendant's mill, a quantity of flour, at a certain price, *payable on delivery*, the plaintiff cannot maintain an action for the non-delivery of the flour, without proving that he was ready to pay for it. *Pinhus v. Hamaker.* xi. 200
27. If a day be appointed for the payment of money, or part of it, or for the doing of any other act or thing, and the day must or may happen, before the thing is to be performed, which is the consideration for which the money is to be paid, or other act done, an action may be maintained for the money, or the non-performance of such other act, before the performance of the act, which was the consideration of that for which the suit was brought. *Edgar v. Boies.* xi. 445
28. If a man covenants, by articles of agreement, to convey land to another, for which the latter agrees to pay by instalments, and, on payment of the last instalment, to receive a deed of conveyance, and he assigns the articles and the land to another, subject to the payment of the whole of the purchase money, by whom no part of it is paid, the vendor cannot after all the instalments have become due, maintain an action of debt for the purchase money against the assignee; there being no privity either of contract or of estate between them. *Beach v. Morris.* xii. 16
29. An action to recover damages for the non-performance of an agreement, under seal for the conveyance of land, is to be brought by the personal representative of the covenantor and not by his heir. *Watson, Administrator, v. Blaine, Executor.* xii. 131
30. Where a defendant, who has sufficient real or personal estate to satisfy the demand, is arrested and imprisoned on a *capias ad satisfaciendum*, trespass *vi et armis*, and not trespass on the case, is the proper form of action against the person who issued the writ. *Berry v. Hamil.* xii. 210
31. The defendant having in his possession a quantity of coin, which he believed to be current money of *Cayenne*, offered to give it to the plaintiffs for goods. The plaintiffs, being ignorant of its value, asked time for inquiry, and having taken several days for that purpose, during which they satisfied themselves on the subject, delivered to the defendant a quantity of goods, for which they received the coin. After having kept it three years, they discovered that it was spurious, upon which they brought an action against the defendant for goods sold and delivered. There was no suggestion of fraud in the defendant, nor was any warranty alleged. *Held*, that the action could not be supported.

- Curcier and another v. Pennock.* xiv. 51
32. Where the goods of a decedent, or the proceeds thereof in money, come into the hands of one who declares that he holds the property in trust for the children of the decedent, the children may, if all the debts of the decedent are paid, maintain a joint action against such person for money had and received, and recover the amount received by him, without having taken out letters of administration on the estate of the decedent. *Lee v. Gibbons.* xiv. 105
33. But if such person has acted unfairly, and wasted the property, the children can, *in this form of action*, recover no more than he has actually received. *Ibid.*
34. An action of debt will not lie on a judgment for damages, obtained under the act of the 6th of *April*, 1802, "to enable purchasers at sheriffs and coroners' sales to obtain possession." The remedy prescribed by the act can alone be pursued. *Moyer v. Kirby.* xiv. 162
- ACTION ON THE CASE.**
See ACTION, 13. WASTE, 1, 2.
- ACTS OF ASSEMBLY.**
See BANKRUPT, 4, 5, 6. DAMAGES, 1, 3, 12. EVIDENCE, 5. INTEREST, 2, 3, 10. LIEN, 2, 3, 9. TAXES, 1, 5, 6, 11, 12, 13.
1. The act of the 28th of *March*, 1808, was not an implied corporation of existing associations. *Myers v. Irwin.* ii. 368
2. The act of the 19th of *March*, 1810, does not involve any violation of contracts. *Ibid.*
3. An act of assembly, declaring that an officer may be removed, on the application of certain persons, means that he shall not be removed without such request. *Commonwealth v. Sutherland.* iii. 145
4. When a law, providing for the appointment of officers by the governor, and limited to a period of years, is continued by a subsequent law for a further period, the commissions of such officers endure only for the time to which the law was originally limited: if there is nothing in such subsequent law inducing a belief that the legislature contemplated taking away the power of appointment from the governor, and especially if material changes are made in the first law. *Ibid.*
5. Courts have power to declare an act of assembly void, but it ought to be exercised only in a very clear case. *Moore v. Houston.* iii. 169
6. Though an act of assembly repeals a former act, yet if from the whole view of it, it is evident that the legislature intended certain parts of the former act to have a temporary continuance, it is not an immediate repeal as to such parts. *Ibid.*
7. The 25th section of the act of the 28th of *March*, 1814, appears to be confined to preventing writs of *certiorari*, and removal of proceedings of courts martial, but does not operate to prevent an inquiry into the jurisdiction of such courts. *Ibid.*
8. By the word month, in an act of assembly, calendar month is intended. *Ibid.*
9. The act of the 14th of *March*, 1814, explanatory of the act for the sale of vacant land within this commonwealth, does not extend to suits commenced before its passage. *Bedford v. Shelling.* iv. 401
10. *Query*, Whether the act embraces the case of a patentee. *Ibid.*
11. This court has no right to decide whether a court of another state has misconstrued an act of assembly of that state, or whether such act is constitutional or not. *Kean v. Rice.* xii. 203
12. The act of the 11th of *March*, 1815, is not to be construed so as to form an immediate bar, by retrospection, to the claims of persons beyond sea, who had been out of possession twenty-one years prior to the passing of the act; but such persons were allowed fifteen years from the 11th of *March*, 1815, for bringing their actions, according to the provisions of the third section of the act of limitations of the 26th of *March*, 1785. *Eakin et al. v. Raub et al.* xii. 330
13. If an act of assembly be a manifest breach of the constitution of the state; it is not only the right but the duty of the court to pronounce such act to be void. *Ibid.*
14. Where civil rights are affected, acts of assembly are to be so construed as not to have a retrospective operation; therefore, when the defendant was sued by a turnpike company, and he was not liable, because he had not paid five dollars a share at the time of subscribing, as required by a former act of assembly, and afterwards, while this suit was pend-

ing, an act was passed by the legislature, declaring that such companies should have the same remedies as if the former acts had contained no such provision, it was held that the act did not affect the case of the defendant. *Ogle v. Somerset, &c. Turnpike Company.* xiii. 257

15. A private act of assembly, authorizing the guardians of infant children, the title to whose real estate is vested in the guardians, to convey such estate to a person with whom the parent of the children, before his death, had contracted to sell it, is valid. *Estep v. Hutchman.* xiv. 435

16. The words of the proviso of the act of the 9th of March, 1826, exempt the owners of a lot at the corner of Vine and Wood Streets, extending more than fifty feet in depth along Wood Street, from assessment, for defraying the expense of pipes, for fifty feet of that depth. *Commissioners of Spring Garden v. Smith.* xv. 160

ACT OF CONGRESS.

See EVIDENCE, 328.

ACTUAL SETTLEMENT.

1. An actual settlement commenced, but not completed prior to the act of the 28th of March, 1814, is protected by the proviso which declares that the right of any person, who may have *actually settled* on vacant land before the passing of that act, shall not be affected by it. And if the settler perseveres in his purpose, and goes on to complete his settlement by personal residence, he will be entitled to a warrant at the price of fifty shillings per hundred acres. He may, however, abandon his settlement, and take out a warrant for so much vacant land, without regard to his improvement; in which case he would be obliged to pay ten pounds per hundred acres. He may also persist in his intention of making an actual settlement, and, before it is completed, take out a warrant at ten pounds per hundred acres, and still retain the advantage of carrying back the commencement of his title to the commencement of his settlement: but, in such case, if there should be an elder adverse warrant, he must satisfy the jury that he never relinquished his intention of completing an actual settlement. *Confair v. Steffey.* vi. 249

2. The act of the 28th of March, 1814,

does not destroy any previous title under a settlement *begun but not perfected.* The settler may perfect his title or relinquish it; and his taking out a warrant under the act of 1814, is not conclusive evidence of abandonment. Whether or not he intends to abandon his title by settlement, is a question to be submitted to the jury under all the circumstances of the case. *Campbell v. Kyler et al.* vi. 257

ADMINISTRATION ACCOUNT.

See EXECUTOR, 1, 7.

1. In an action for a distributive share of a decedent's estate, the settlement of the administration account in the Orphans' Court, is not conclusive. *Kohr v. Federhaff.* x. 248

2. The administration account is not evidence on behalf of the administrator to show there was no debt due from the intestate to the plaintiff. *Lehn v. Lehn.* ix. 57

3. The settlement and confirmation of a partial administration account, do not preclude the court, on the settlement of a supplementary account, from inquiring into errors in the first account; particularly where minors are interested in the estate, who had no guardians when the first account was settled. *Case of M'Grew's Appeal.* xiv. 396

4. After a lapse of six years, with other circumstances, executors settling an account in the office, charging themselves jointly, are not allowed to settle separate administration accounts, whereby some of them are discharged as to creditors. *M'Coy v. Porter.* xv. 57

ADMINISTRATION BOND.

See ASSIGNMENT OF BREACHES, 1. EXECUTORS AND ADMINISTRATORS, 4, 5, 6, 34. JEOPAILS, 1.

1. An equitable defence for the parties in an administration bond founded on the negligence of parties in not citing the administrators is proper in a *scire facias* after judgment for the penalty, but not in a suit on the bond itself. *Carl v. The Commonwealth.* ix. 63

2. If the person entitled to a distributive share of the estate of an intestate takes the bond of the administrator for the payment of the amount of the share, the surety in the administration bond is discharged to such amount. *Commonwealth v. Shyrook.* xv. 69

ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS, 4, 5, 6, 34. EXECUTION, 8, 9, 10. FEES, 12. FEIGNED ISSUE, 4. ORPHAN'S COURT, PASSIM. PARTNERS, 1, 2. PRINCIPAL AND SURETY, 4, 6. REGISTER'S COURT, 1, 2, 3. SCIRE FACIAS, 6. WILL, 13, 15. WITNESS, 12, 31, 34, 76. WRIT OF ERROR, 19.

1. An administrator has no right to involve the estate of his intestate in the risk of a mercantile adventure by exporting the goods. *Callaghan v. Hale*. i. 241.
2. Where a quantity of wine, belonging to the estate, was shipped by the administrator to the West Indies, and the net proceeds were less than the value here, he was held accountable for the difference. *Ibid*.
3. Having suffered a just debt to remain unpaid for several years, though there were *assets* in his hands, he was not allowed to charge the estate with interest and costs. *Ibid*.
4. Held to be entitled to interest on his advances, and not chargeable with it on account of furniture which he did not use, but delivered to the widow. *Ibid*.
5. His commissions, though not allowed till the settlement of his account, to be deducted from the balance before interest to be computed. *Ibid*.
6. The administrators *de bonis non* of A. cannot maintain *assumpsit* against the administrators of the executor of A. for money had and received by such executor to their use; and the mixing such a demand with others is error. *Allen v. Irwin*. i. 549.
7. Query. Whether the administrators *de bonis non* of A. are entitled to recover in any form of action against the administrators of the executors of A. the balance due to the estate of such executor? *Ibid*.
8. A statement cannot to filed in lieu of a declaration in a suit for such a balance. It seems however that if the defendant accept such statement and proceed to issue, the court will not reverse the judgment for that cause. *Ibid*.
9. A. and B. were administrators of C. B died and administration of his estate was taken out and bond given. A. settled his account and was charged

ed with the whole personal estate; but by a report of auditors, B. appeared accountable for a part. Held that if A. bring suit on such administration bond and die, the name of the administrator *de bonis non* of C. cannot be substituted as plaintiff; it should to A's administrator. *Shelley v. Dailey*. ii. 548.

10. A plaintiff who sues as administrator *cum testamento annexo* during the absence of the executor, must aver in his declaration that such executor continued to be absent at the time of bringing the action; and an omission to do so is fatal. *Lewis v. Ewing*. iii. 44.
11. But if the defendant puts in a plea to the merits, the error is cured. *Ibid*.
12. But such defect is not cured when judgment is obtained by default, for want of an affidavit of defence; nor by the act of the 21st March, 1806. *Ibid*.
13. Where bonds belonging to an intestate, were assigned by him to the husband of one of his daughters, as an advance of her share of his estate, held that the obligor who became afterwards administrator, might in a suit by the assignee of such husband, set off the proportion overpaid by him, in settling the debts of the intestate, if it did not appear that the obligor gave such assignee reason to suppose, that he had no set off. *Dasher v. Leana-weaver*. iii. 200.
14. Administrator's accounts passed by the Orphans' Court, are *prima facie* evidence of the estate of the intestate, and of the debts paid by the administrator, but not conclusive. *Ibid*.
15. An administrator *cum testamento annexo* may by virtue of the act of 12th March, 1820, maintain ejectment on non-payment, by the vendee, of the purchase money of lands sold by the former executors under the authority of the will. *Cornell v. Green*. x. 14.
16. On the death of the plaintiff after judgment and the suggestion thereof on the record, his administrator may issue execution without *scire facias*. But the defendant may be enabled to avail himself of any defence which he might have had on a *scire facias*. *Deiser v. Sterling*. x. 119.
17. Confession of judgment generally *de bonis* in an action against an exe-

cutor or administrator, is not conclusive proof in this state, of the existence of assets, in a suit suggesting a *devastavit*; but the existence of assets must be proved by evidence *aliunde*. *Hussey v. White*.

x. 346

18. If judgment be entered against an executor *de bonis*, execution to be levied of the lands of the deceased for a certain sum, it is to be considered as a judgment *de terris*, and is not evidence of a *devastavit* against the executor, on a return of *nulla bona* and *devastavit*, where a levy has been made on lands and part payment received. *Moore v. Kerr*.

x. 348

19. An administrator cannot maintain an action against his co-administratrix, (who was the widow of the intestate,) for money received by her beyond her share in her husband's estate, before a final settlement of the administration account, and while a balance remains in his hands due to the estate. *Steinman v. Saunderson*.

xiv. 357

It seems, that after a final settlement of the administration account, and payment of the balance to those who are entitled to receive it, such an action may be maintained. *Ibid*.

20. A. and B. being the administrators of C. who died indebted as partner of the firm of C. and D. to E. by speciality, and to F. by simple contract, and leaving a separate real estate, contracted, by virtue of a private act of assembly, to sell part of the said estate to F. who was to retain the purchase money, the amount of which was to be credited in the books of the firm. At the time of contract, the firm was in good credit, and supposed to be solvent. It turned out, however, to be otherwise; and the administrators, to guard themselves against the consequences of a *devastavit*, took from F. the purchaser, a bond, conditioned to indemnify them against liability to the other creditors, in consequence of making the conveyance. The estate was then conveyed to F. who afterwards sold it; and A. who had since become the executor of E. alleging that he had in that character, a lien upon the estate conveyed to F. for the debt due from the estate of C. to that of E., it was agreed at the request of F. that the purchase money should be substituted for the land, and placed in the hands of the

defendants, as trustees, A. being one of them, to be applied to the satisfaction of the alleged lien, in case it should be established. *Held*, that, as A. in the character of administrator of C. was liable for a *devastavit*, to those who were entitled under the will of E. and as on a recovery against him, the bond of indemnity given by F. would be forfeited at law, he was entitled, on the principle of *quia timet*, to retain the fund in his hands, to satisfy the debt due to the estate of E. *Sims's Administrator v. Chew*.

xv. 197

ADMISSIONS.

Though the plaintiff before arbitrators concedes to the defendant a credit for illegal lottery tickets, which is allowed in the award, yet, if the defendant appeals, the plaintiff is not on the trial bound by such concession. *Pedant v. Hopkins*.

xiii. 45

ADULTERY.

See INDICTMENT, 17. MAINTENANCE, 1.

ADVANCEMENT.

See EVIDENCE, 95. HOTCHPOT, 1. RELEASE, 5.

AFFIDAVIT.

See ARBITRATION, 9, 21. BAIL, 5, BOOKS AND WRITINGS, 3, 4, 5, 6. FOREIGN ATTACHMENT 7. PRACTICE, 4, 16. SHERIFF'S SALE, 8, 9. WRIT OF ERROR, 1, 18, 19.

AFFIDAVIT OF DEFENCE.

1. Bonds with a collateral condition are not within a rule of court, requiring an *affidavit* of defence in all actions of debt or contract for the payment of a specific sum of money. *Boas v. Nagle*. iii. 250
2. Such a rule of court ought to receive a strict construction. *Ibid*.
3. Where an action is brought against an executor for a debt due from the testator, an *affidavit* of defence is not required; but where there is a judgment against the executor himself, such an *affidavit* is necessary, in a *scire facias post annum et diem*. *Umberger, Executor of Umberger, v. Zearing*. viii. 163

AGENT.

See CORPORATION, 22. LIEN, 8. PAROL SALE, 2, 3. WITNESS, 17, 26, 38, 53, 57.

1. If an agent empowered to contract

- for sale, sell and convey land, enter into articles of agreement, by which it is stipulated that the vendee shall clear, make improvements, pay the purchase money by instalments, &c. &c. and on the completion of the covenants to be performed by him, receive from the vendor, or his legal representative, a good and sufficient warrantee deed, in fee, for the premises, the receipt of the agent for such parts of the purchase money, as may be paid before the execution of the deed, is binding on the principal. *Peck et al. v. Harriott et. al.* vi. 146.
2. An agent, who in the course of trade deposits his principal's funds in the hands of a third person then in good credit, subject to his principal's draughts for the amount, is not liable for loss sustained by the subsequent insolvency of the third person. *Hammon and Daniel v. Cottle.* vi. 290.
 3. *Query*, Whether he ought not to have obtained and transmitted to his principal, a document from such third person, recognising the deposit, and on what account; but if it appear that the insolvency had taken place before such document could have been made use of, the question cannot arise. *Ibid.*
 4. A factor cannot pledge the goods of his principal for his own debt; but if a merchandise broker to whom goods are delivered by his principal, with power to sell, deliver and receive payment, deposit them in the usual course of business with a commission merchant, connected in business with a licensed auctioneer, who advances his notes thereon, the deposit binds the principal, who cannot recover the value of the goods in an action of trover. *Laussatt v. Liphincott.* vi. 386
 5. If an agent employed to bid for the vendor at a public sale, at a limited price, exceed his authority, he is considered as making the purchase on his own account, and may be sued as purchaser. *Hampton v. Speck-enagle.* ix. 212
 6. An agent paying out money received without notice is liable to a suit to recover it back, if he obtained the money fraudulently. *Seidel v. Peckworth.* x. 444
 7. How far an agent, who contracts in his own name, without disclosing his principal, is liable personally. *Allen et al. v. Rostain.* xi. 362
 8. A contract made by an agent of the plaintiffs with the defendants personally, for the transportation of goods on freight is not affected by the fact that another agent of the plaintiffs, to whom the goods were consigned, knew that the boat in which they were shipped, belonged to another house, for whom the defendants were agents. *Ibid.*
 9. A principal, who neglects promptly to disavow an act of his agent, who has transcended his authority, makes the act his own. *Bredin v. Dubarry.* xiv. 27
 10. One who has only a parol authority for the purpose, cannot bind his principal by affixing, in his absence, his name and seal to a bond. *Gordon v. Bulkeley.* xiv. 331
- ### AGREEMENT.
- See* ACTION, 6. APPEAL 25. CONSIDERATION, 1, 2. DEED, 11, 13, 14, 15. EVIDENCE, 40, 41, 190, 191. JUDGMENT, 1, 2, 7, 31. PAROL EVIDENCE, 1, 6, 14. PLEADING, 1, 2, 20, 34, 49.
1. An agreement under seal, accepted as a collateral security, is not a merger of a simple contract debt, and may be read in evidence to show the amount originally due. *Charles v. Scott.* i. 294
 2. The deposition of a subscribing witness may be read to prove the execution of such an agreement. *Ibid.*
 3. Parties to an agreement must be acquainted with the extent of their rights, and the nature of the information they can call for respecting them, else they will not be bound. But when the parties treat upon the basis that the fact which is the subject of the agreement is doubtful, and the consequent risk each one is to encounter, is taken into consideration in the stipulations assented to, the contract will be valid notwithstanding any mistake of one of the parties, provided there be no concealment or unfair dealing by the opposite party that would affect any other contract. *Perkins v. Gay.* iii. 327
 4. Where the defendant agreed, on a sale of land, to refund the money in case the plaintiff could not hold the land by law, but after an action and trial at court should lose the same, held that where an ejectment was afterwards brought for the land by one of several heirs, and after a jury sworn, the attorney of the plaintiff,

- (who had given notice to the defendant,) being convinced that the title of the plaintiff was not good, fairly and *bona fide*, made a compromise, and a verdict was taken for the plaintiff in the ejectment by agreement, the plaintiff is not bound to stand other ejectments, but may demand repayment of his money. *Dickey v. Schreider.* iii. 413
5. Where time admits of compensation, as it perhaps always does, where lapse of it arises from the non-payment of money at a particular day, it is never an essential part of an agreement. *Decamp v. Feay.* v. 323
6. An agreement after non-payment on the day stipulated, that if the whole sum should not be paid at a certain day, the prior payment should be forfeited, and the original bargain be at an end, does not give any original right to rescind. *Ibid.*
7. Time, generally speaking, is not essential in equity: but considerable delay when it is not accounted for, is considered as abandonment, or where it diminishes the value of the thing contracted for, is material. *Bellas v. Hays.* v. 427
8. The grantee of land subject to a right of way, is entitled to the benefit of an agreement in relation to that right, entered into between those from whom he has derived his title, and those who claim the right of way; and in an action on the case for disturbing the right of way, he may give such agreement in evidence. *Greenwall et al. v. Horner et al.* vi. 71
9. The statute of frauds and perjuries, has no operation on an agreement, not in writing, entered into between the petitioners for a private road, and the owner of the land over which it is to pass, in the presence of the viewers appointed to appraise the damages, in relation to the removal of the road on a future event, where the agreement forms the basis of their estimate of the damages, and their report is confirmed by the court, possession of the land taken by the petitioners, the damages paid, and a receipt for the amount given. *Ibid.*
10. An agreement to refer all matters in variance between A. and B. to certain persons, "who, or a majority of whom, shall make an award under their hands and seals, under a rule under the act of 1705, which makes the award of referees as binding as the verdict of a jury," is sufficient to authorize the entry of an action and rule of reference, without being attested by subscribing witnesses, or accompanied by an affidavit that it was duly executed; and the docket entry of such an agreement is evidence of its having been filed. If a party deny the existence of such a submission, he should apply to the court in which the action was entered to strike it off. *Herman v. Freeman.* viii. 9
11. Where an act incorporating a turnpike company appointed commissioners to take subscriptions, who were directed to receive from subscribers five dollars for each share subscribed previous to subscription, and required the Governor to grant a patent of incorporation on receiving the certificate of the commissioners, that a certain number of shares had been subscribed, it was held that the commissioners could not dispense with the previous payment of five dollars; and that if they permitted a subscription to be made without such payment, the contract was void, and the company could not, after their incorporation, recover the amount which ought to have been paid. *Hibernia Turnpike Company v. Henderson.* viii. 219
12. A paper filed in the cause by one party, offering to be bound by certain terms, if the verdict should be in his favour, but not accepted by the other party, is not obligatory on the party who filed it. *Bower v. Blessing.* viii. 243
13. Where one enters into a parol agreement to sell lands, and delivers possession without having received any part of the purchase money the legal estate remains in him, and descends, at his death to his heir at law; and if the heir convey to another, by general words, all the real estate of which his ancestor died seised, the land, in reference to which the agreement was made passes to the alienee, subject to the agreement. *Vincent v. Lessee of Huff.* viii. 381
14. If A. has an equity in a tract of land, under an agreement with B., that equity descends, at his death, to his heir at law and no act of his widow will transfer it to C. The heir must transfer his right to C. or at least acquiesce in C's. taking his

place and completing the contract, before C. can derive any advantage from it. If without making any conveyance to C. the heir of A. relinquish the contract, and a new agreement be made with C. by the heir of B., the consent of D. to whom the heir of B. had conveyed all the real estate of which his ancestor died seised, would be necessary to give it effect; for although D. held the legal title subject to the contract with A. he did not hold it subject to any agreement which the heir of B. might make with any other person. No writing signed by the heir of B. either in that character or as administrator of B. without the assent of D. would pass any right to any other person than the legal representative of A. *Ibid.*

15. If a man enters into an article of agreement for the conveyance of a piece of land, and in the same article undertakes to convey or cause to be conveyed, all the right, title, claim and interest of A. B. in another piece of land, the article is not extinguished by a deed conveying only the land first mentioned. Hence, in an action for the purchase money, after the deed has been read to the jury, the defendant may give in evidence the article of agreement, to show that it has not been fully complied with. *Brown v. Moorhead.* viii. 569

16. D. L. being indebted on bond to the estate of his deceased father, A. L., in order to pay that and other debts, entered into an agreement with the administrators of A. L., by which it was stipulated, that he should sell to them the plantation on which he lived, together with the stock, and that they should sell the same to the best advantage, and apply the proceeds, in the first place, to the payment of the other debts of D. L., and the residue, if any, to the extinguishment of his bond, "and if the plantation and stock brought more than settled the debts, including the bond, return the overplus to him; but if not enough, the administrators were to be satisfied with what the property brought; and not call on D. L. for any more hereafter." *Held*, that the sale of the plantation and stock, and the proceeds arising from them, were an extinguishment of the bond. *Hisa v. Lucas.* xiv. 209

17. On a sale of chattels, if the ven-

dor and vendee agree that the possession shall pass to the vendee, but the property remain in the vendor until the whole purchase money is paid, such agreement, as respects creditors and the sheriff, is fraudulent; and it is immaterial whether it appear that the creditor trusted the debtor on the credit of the goods which were in his possession, or not. *Martin v. Mathiott.* xiv. 214

18. In *October*, 1815, N. contracted with P. and E., to convey to them three tracts of land in *July*, 1818, and give them immediate possession, in consideration whereof, P. and E. agreed to pay one thousand dollars, in three annual payments, of three hundred and thirty-three dollars and thirty-three cents each: it was further agreed, that if P. and E. did not pay the monies at the times agreed upon, the agreement should be void, and P. and E. should deliver up the possession to N. and pay rent for the time they occupied. P. and E. paid the first instalment, but no more: they afterwards abandoned the land and N. took possession. *Held*, that N. was not bound to refund the instalment he had received, reserving a reasonable rent. *Powder v. North.* xv. 1

19. An agreement to try who might be entitled to a fund in the hands of the defendants as stockholders, liberally construed, for the purpose of doing complete justice between the parties. *Sims's Administrator v. Chew.* xv. 197

20. When there is an agreement for the sale of lands, and possession delivered, and money paid, but not to the amount, and at the times agreed on, and the owner resumes the possession, and declares that he does so because the contract is at an end, and he is determined it shall be so, this is a disaffirmance of the contract, and the other party may recover back what he has paid. *Feay v. Decamp.* xv. 227

ALDERMAN.

- See APPEAL, 2, 3, 7, 8, 9, 11, 12, 14, 15, 16, 20, 21, 27, 28, 29. APPRENTICE, 2. JUSTICE OF THE PEACE, 5, 9, 33. RECOGNIZANCE, 9, 10, 15.

ALIEN.

Under the charter of the German Lutheran congregation, in and near the city of *Philadelphia*, aliens, other-

wise qualified, are entitled to vote.
Commonwealth v. Woelfer. iii. 29

ALIEN ENEMY.

See PRACTICE, 3.

ALLOCATUR.

See ERROR, 21, 28.

After appearance to a writ of error and argument commenced, the want of an allocatur is no objection. *Eckert v. Wilson.* x. 44

ALLEGHANY COUNTY.

See COUNTY COMMISSIONERS, 9, 10, 11, 12.

ALTERATION.

See PROMISSORY NOTE, 14, 15.

1. Some time after the execution of a single bill, two persons, not present at the execution, and without any new delivery, put their names to it as witnesses, at the request of the obligee, who was about to assign it. *Held*, that if it was done by mistake, and with the intention of witnessing the assignment and not the bill, it did not avoid the instrument; but if done to authenticate the bill, it was rendered void by such alteration. *Marshall v. Gougler.* x. 164
2. If in a suit on a single bill, it appear that at the time of its execution a blank was left where the name of the payee was afterwards inserted, but evidence is given tending to show, that it was left blank in order that the name of the payer might afterwards be inserted, the due execution of the instrument is for the jury to decide, and it is error for the court to reject the bill. If a blank be left in a single bill, when it is executed, for the name of the payer, with an intention that it should be filled up when the money is borrowed of him, and an authority is giving to that effect by the obligor, and the money afterwards is obtained and the name inserted, this is not such an alteration as avoids the bill, but it is valid. *Stahl v. Berger.* x. 170

AMENDMENT.

See DECLARATION, 11. ERROR, 51.

PLEADING 43. PRACTICE, 1, 5, 8.

WRIT OF ERROR, 23.

1. A declaration in *assumpsit* may be amended after verdict, by altering the day on which the promise was laid, if it tends to the promotion of justice. *Bailey v. Musgrave.* ii. 219
2. Amendments must be governed by the sound discretion of the court. *Id.*

3. Leaving a blank in the writ of error for the month in which the court is to be held, is a clerical error which this court may amend by the *præcipe*. *Reed v. Collins.* v. 351

4. The court will not permit a declaration to be amended by the introduction of a new and entirely different cause of action from that originally set forth. *Farmers and Mechanics' Bank v. Israel.* vi. 293

5. It seems however that if it clearly appear, that such cause of action was omitted to be declared on by mistake, relief would be granted, provided an application to amend were made within a reasonable time. *Ibid.*

6. The granting or refusing an amendment, in cases in which the court below exercises a discretionary power is not assignable as error. *Ordre-neaux v. Prady.* vi. 510

7. Where a proposed alteration of a declaration would introduce an entirely new cause of action, it cannot be permitted; but where it merely lays the same contract or wrong in a different manner, which the plaintiff thinks will best correspond with the nature of his complaint and with his proof, it may be allowed, after the jury is sworn. *Cassell v. Cook.* viii. 268

8. If the plaintiff declare in *assumpsit* for a breach of promise to convey land, he may amend the declaration, by setting forth again the breach of contract, blended with complaints of fraud; for, substantially, it is declaring in *assumpsit*. *Cavene et al. v. M'Michael.* viii. 441

9. In an action on a sheriff's official bond, the plaintiff may assign new breaches of the condition of the bond, after the jury is sworn. *Shannon et al. v. Commonwealth for the use of Lazarus.* viii. 444

10. Where there is a general verdict on several counts, the court cannot amend the judgment by entering it specially on one count, and leaving the other count without a judgment, though they might amend the verdict and then make the judgment correspond. *Paul v. Harden.* ix. 23

11. An omission in a *levari facias* of the command to levy the debt is a clerical mistake, and may be amended, after error brought, by the court above. *Peddle v. Hollingshead.* ix. 277

12. Amendments under the act of 1806, being prescribed by law, are not discretionary, but mandatory, and

- therefore subjects of writs of error. *Newlin v. Palmer.* xi. 98
13. But these amendments are not to be permitted when they introduce a new cause of action. *Ibid.*
14. The court ought not to allow the general issue to be struck out on the trial, and an affirmative plea to be put in, giving the defendant the right of conclusion: especially if it only vary the form of the plea, without making any essential difference. *Weidman v. Kohr.* xiii. 17
15. Though the writ be in debt, the declaration in *assumpsit*, the plea *non-assumpsit*, and the verdict find a certain sum in debt and another in damages, the proceedings are good, under the act of the 21st of March, 1806. The court may mould such verdict into form. *Pedan v. Roberts.* xiii. 45
16. A special demurrer for want of form is not allowable during a trial, under the act of the 21st of March, 1806, allowing amendments of pleas, &c. *Ibid.*
17. Defects in a general avowry entered in short, are cured by replying and going to trial. *Weidel v. Roseberry.* xiii. 178
18. The plea of judgment recovered, may be added under the act respecting amendments, during the trial. *Garvin v. Dawson.* xiii. 246
19. A declaration in a suit against the sureties in a sheriff's bond, may be amended, notwithstanding five years have elapsed from the date of the bond. *Beeson v. The Commonwealth.* xiii. 249
20. If on the plea of payment, the defendant is precluded at the trial from giving evidence of the special matter by omission to give previous notice thereof, he may amend his plea under the act of assembly, and set forth the special matter in such plea, and it is error in the court to refuse him permission to do so. *Sharp v. Sharp.* xiii. 444
21. Where the wrong for which the plaintiff seeks redress, is the misconduct of the defendant as his agent in the sales of certain cottons consigned to him, the plaintiff may amend his declaration under the act of assignment by adding counts, preserving the substance of the same complaint. *Rodrigue v. Curcier.* xv. 81

ANNUITY.

See HUSBAND AND WIFE, 9.
A. and B., seised of lands in fee as tenants

in common, two-thirds belonging to A. and one-third to B., agreed to sell it to the defendants, securing an annuity charged on the land, and constituted one of the defendants their attorney to sell parcels of the land in the names of A. and B., reserving ground rents payable to A. and B., and their heirs as tenants in common, and when sufficient was sold to produce the amount of the annuity, A. and B. were to convey the residue of the land to the defendants; in the mean time the defendants to pay the annuity; but in case sufficient was not sold in fifteen years, A. and B. were to convey the residue to the defendants; the defendants to be, in all events, responsible for the annuity till secured out of the land: *held*, that this annuity was descendible to the heirs of A. and B. according to their interest in the land, and did not, on A's. death, survive to B., nor go to A's. administrator; though there was a covenant by the defendant with A. and B. and their heirs for the premises, and also that nothing in the agreement contained should prejudice the right of the said A. and B., their administrators and assigns, to sue the defendants for any breaches of covenant; for these covenants descend to the heirs, and not to the survivor or administrator. *Hamilton v. Cadwalader.* iii. 519

APPEAL.

- See ARBITRATION, 9, 21, 30, 32, 33, 46. ARBITRATION AND AWARD, 1, 2, 3, 5, 6, 7. ARBITRATION LAW. CORPORATION, 22. COSTS, 5, 16, 17, 19, 21, 23, 24. DIVORCE, 3, 4, 6. ERROR, 37, 53. EVIDENCE, 207. JUSTICE OF THE PEACE, 2, 8, 12, 26, 27, 31, 32. ORPHANS' COURT, 10. RECOGNIZANCE, 15. RETAILERS, 1, 2.
1. No appeal lies from an award made under an agreement to refer to men on whose decision, or [that of] a majority of them, judgment is to be entered by the prothonotary. *Kimel et al. v. Shank.* i. 24
2. The security of a defendant on appeal from the judgment of a justice of the peace, in trespass, must be in double the amount recovered. *Langs v. Galbraith.* i. 491
3. Where judgment is given before a justice of the peace against two de-

- fendants, an appeal by one is good, notwithstanding the other comes into court and dissents. *Gallagher v. Jackson.* i. 492
4. If one of several defendants make the *affidavit* required by the "Act regulating arbitrations," for an appeal, and the recognizance be for all the defendants, the appeal will stand for all. But if either of them come into court and desire to be severed, he may be severed, and then the appeal will go on in the name of the others. *Lafitte v. Lafitte.* ii. 107
5. The Supreme Court will not entertain an appeal from a judgment of the Orphans' Court, entered *pro forma*, and without prejudice. *Appeal of George West.* iii. 92
6. It will not proceed in such case even with the consent of the parties. *Ibid.*
7. An appeal lies from a judgment before a justice of the peace upon a *scire facias*. *Guilky v. Gillingham.* iii. 93
8. To warrant an appeal by the defendant from the judgment of a justice of the peace, it must appear that a recognizance was taken as prescribed by law. *Ibid.*
9. If on an appeal from a justice, the cause of action be laid in the *narr.* on a day subsequent to the commencement of the suit before the justice, it is error. *M'Laughlin v. Parker.* iii. 144
10. Where the recognizance given on appeal by defendant from an award of arbitrators, was only conditioned for the payment of the costs, but the plaintiff afterwards filed a declaration, the defendant pleaded, issue was joined, and the cause continued on the trial list for several years, it was *held*, that the bail was waived by the plaintiff. *Zeigler v. Fowler.* iii. 238
11. Where upon appeal from the judgment of a justice of the peace, for less than one hundred dollars, the sum awarded by the arbitrators exceeded the sum of one hundred dollars and interest thereon up to the time of the award, *held*, that the justice had not jurisdiction. *Laird v. M'Conachy.* iii. 290
12. If on an appeal by the plaintiff from the judgment of a justice of the peace on an award of referees in favour of the defendant for a certain sum, the defendant recover a less sum in the Common Pleas, the plaintiff is not entitled to costs. *Bowman v. Bear.* iii. 308
13. Though a recognizance taken on an appeal from arbitrators is defective, yet if it has been acquiesced in for more than twelve months, in consequence of which the party has been put to expense in preparing for trial, the objection comes too late. *Clarke v. M'Anulty.* iii. 364
14. An appeal on 21st *March*, from a judgment before an alderman, the 1st of *March*, preceding, is in time. *Browne v. Browne.* iii. 496
15. If in an action of trover under the act of 22d *March*, 1814, an alderman or justice of the peace render judgment for the defendant, the plaintiff, if his demand for damages for the injury sustained, exceed five dollars and thirty-three cents, has the right of appeal. *Stewart v. Keemle.* iv. 72.
16. No appeal lies from the judgment of a justice of the peace in a matter exceeding one hundred dollars, referred to him by consent under the 14th section of the act of 20th *March*, 1810. Nor will any act done by the appellee, tending to show an acquiescence on the appeal, render it good. *Morrison v. Weaver.* iv. 190
17. When upon an appeal by defendant from an award of arbitrators, the verdict is for a less sum than the award, the plaintiff is not entitled to recover the costs accruing upon the appeal. *Landis v. Shaeffer.* iv. 196
18. It is not necessary, that in all cases, a recognizance on an appeal from an award of arbitrators, should be in the very words of the act of assembly. *Witman v. Ely.* iv. 260
19. *It seems* a statement is not proper on appeal from a magistrate. *Stekley v. Harp.* v. 544
20. It is error if on appeal from a magistrate, the cause tried is different from that in which the appeal is entered. *Ibid.*
21. No appeal lies to the Common Pleas from the judgment of an alderman or a justice, founded upon an award of referees not exceeding twenty dollars. *Ulrich v. Larkey's Executrix.* vi. 285
22. In an action against executors on a joint bond given by the testator and another, the defendants pleaded a former recovery. *Held*, that an award made by arbitrators

- in a former suit on the bond against both obligors, in which the appeal was entered, but the defendant's testator died during the pendency of the appeal, and the other defendant disavowed the appeal, supported the plea. *Reed v. Garvin's Executors.* vii. 254
23. In such joint suit where one obligor dies after the appeal, a *scire facias* may issue against his executors to compel them to become parties. *Ibid.*
24. The real estate of the testator is not discharged from the debt: *Query* Whether the personal estate is discharged. *Ibid.*
25. The right of appeal from an award of arbitrators, when given by an act of assembly, cannot be taken away, except by an agreement in writing, made part of the proceedings in court, or before a justice when the suit is before him. *Dawson v. Cowdy.* vii. 366
26. If an appeal from an award of arbitrators be entered after twenty days from the time of filing the award, the irregularity may be cured by the acquiescence and acts of the appellee; and a delay of three years in moving to quash the appeal will amount to a waiver of such an objection. *Mayes and others v. Jacoby.* viii. 526
27. A corporation must give absolute security for the debt, interest and costs, on appealing from the judgment of an alderman against them. If the security be for less the appeal may be dismissed. *Germantown and Perkiomen Turnpike Company v. Naglee.* ix. 227
28. When in a suit before a justice, there is an award of arbitrators that the plaintiff has no cause of action, no appeal lies, if it do not appear on the justice's docket, that the plaintiff's demand exceeded twenty dollars. *Stoy's Administrator v. Yost.* xii. 385
29. When in a suit before a justice, the sum demanded and set forth in his docket, exceed twenty dollars, and arbitrators find for the defendant, or reduce the plaintiff's demand more than twenty dollars, the plaintiff is entitled to an appeal. *Soop v. Coates.* xii. 388
30. An appeal from the Orphans' Court is within the provisions of the act of Assembly, requiring an oath that the same is not intended for delay. *Heckert's Appeal.* xiii. 48
31. Where the appellee shall be considered as waiving all objections to the want of an oath by the appellant, on appeal from the Orphans' Court. *Ibid.*
32. The defendants suffering more than a year to pass from the time of an appeal from an award, and putting the plaintiff to expense in preparing for trial, is a waiver of the objections, that there was no oath by the plaintiff on the appeal, and that his recognizance was in the nature of special bail, instead of being for the payment of the money. *Cameron v. Montgomery.* xiii. 128
33. In debt on bond for the purchase money of land, where the defence was that the land was encumbered, and the plaintiff had covenanted to warrant the title, arbitrators were appointed who awarded the whole sum to the plaintiff. The defendant paid off part of the incumbrance before the award, and part after: on appeal verdict and judgment were rendered for less than the award, the amount of the incumbrances being deducted by the jury: held that the plaintiff was not entitled to the costs accrued after the appeal. *Poke v. Kelley.* xiii. 165
34. An absolute recognizance given by a defendant and his surety on entering an appeal from an award of arbitrators is void, and a *scire facias* cannot be sustained upon it. *Bolton v. Robinson.* xiii. 166
35. On appeal by the plaintiff from the report of arbitrators the recognizance on the docket was as follows: "Plaintiff appeals, *John Cunningham and John Sink* tent in one hundred dollars each, *coram William Sample*, prothonotary. Held, to be a defective recognizance and the appeal irregularly entered. *Donaldson v. Cunnigham.* xiii. 243
36. Under the act of the 22d March, 1817, relative to suits by or against corporations, the *Schuylkill Navigation Company* is bound to give bail on an appeal from the report of referees appointed by virtue of the act of assembly incorporating them. *Schuylkill Navigation Company v. Thomas—Same v. Jacobs.* xiii. 431
37. Motion to dismiss an appeal from the judgment of a justice of the peace, on account of a defect in the recognizance of bail, must be made within a reasonable time; and if it be delayed nearly two years, it is to

be presumed that the appellee waives all exceptions to the recognizance. *Shank v. Warfel.* xiv. 205

APPEARANCE.

See PLEADING, 17, 18. PRACTICE, 17.

1. When there are several defendants on the record, an attorney who enters an appearance generally for the defendants by implication appears for all; but the plaintiff may consider it an appearance only for those who are arrested or summoned. When therefore a summons in trespass issued against three, two of whom were summoned, and as to the other *nihil* was returned, a rule of arbitration by the two who were summoned and an award was made against one of them who appealed, from whom alone the plaintiff accepted a plea and went on to trial, though an appearance was entered generally for the defendants, it was held to be an appearance only for those who were summoned, and that the third was a competent witness for them. *Lentz v. Stroh.*

vi. 34

2. Where an appearance *de bene esse* is entered for the defendant, the plaintiff cannot sign judgment for want of an appearance. *Blair v. Weaver.* xi. 84

3. Entering an attorney's name on the margin of the docket opposite the defendant's name is not a sufficient appearance, where by the practice of the Court an entry of the appearance must be made in the docket. *Lyon v. Waldron.* xiii. 164

APPLICATION.

See EJECTMENT, 7. LANDS, 3, 9, 10, 11, 12. WARRANT AND SURVEY, 13, 32, 33, 35, 36.

1. If an application for land be descriptive and due diligence, be used, the title commences from the application. If it be loose, it dates from the survey, unless the party forfeit his right by misconduct. *Lilly v. Paschal's Executors.* ii. 394

2. A title by application and survey may be abandoned. *Ibid.*

3. When an application was made in 1767 for lands, including an improvement which was made in 1762, the omission of the improver to apply within six months from the opening of the office, or to produce a certificate of the nature of his improvement, or of the time of its commencement, is a forfeiture of all pretension

to carry the title farther back than the date of the application. *Burns v. Swift.* ii. 436

4. Whether an application is fraudulent, is properly submitted to the jury. *M'Irvine v. M'Irvine.* vi. 559

APPOINTMENT.

See EVIDENCE, 48. OFFICES, 1, 4, 5. POWERS, 2.

APPRAISEMENT.

See INTESATE, 1.

APPRENTICE.

See COVENANT, 12. HABEAS CORPUS, 1.

1. The consent of a parent or guardian of an apprentice, as well as that of himself, is necessary to give validity to an assignment of an indenture. *Commonwealth v. Vanlear.* i. 248

2. Aldermen have the same power in relation to this subject as justices of the peace. *Ibid.*

3. An indenture of apprenticeship may be vacated by the consent of all the parties to it. *Graham v. Graham.* i. 330

4. An indenture executed by one as *master* and *next friend* of an apprentice, is void. The master is not *such a next friend*, as is contemplated by the act of the 29th of September, 1770. *Commonwealth v. Kendig.* i. 366

5. In the binding of an infant apprentice, by the overseers of the poor, it is not necessary that the infant should join in the indenture. *Commonwealth v. Jones.* iii. 158

6. The assent of the parties necessary to give validity to an assignment of an indenture of apprenticeship must be certified by the justice, or at least expressed in writing before him, and attached to the instrument at the time of such assignment. Parol proof afterwards will not suffice. *Ibid.*

7. An indenture binding an apprentice to a man, *his heirs and assigns*, without naming *executors*, cannot be assigned by his executors. *Commonwealth v. King.* iv. 109

8. *Query*, Whether the executor is liable on the covenants to provide meat, drink, and clothing, &c. though not liable on the covenants to instruct. *Ibid.*

9. The mother of an infant, though married to a second husband, is a parent within the meaning of the act of the 29th of September, 1770, and may give her assent to an in-

indenture of apprenticeship, independently of her husband. *Commonwealth v. Eglee*. vi. 340

10. An indenture of apprenticeship, executed in *England*, for instruction in an art which does not require the apprentice to leave the kingdom, ceases to be obligatory on his removal to this country, although it does not appear that he accompanied his master through compulsion. *Commonwealth v. Deacon*. vi. 526
11. A writing without seal is not an indenture of apprenticeship within the meaning of the act of assembly. *Commonwealth v. Nilbank*. x. 416

APPROPRIATION.

1. Where A. was indebted to B. on a *quantum meruit* for services performed, and B. drew a draft at sight for a part of his claim in favour of C. upon A., which A. refused to pay, but afterwards gave B. a check for the amount of the draft, saying that "it was in full of the draft;" it was held that B. had a right to credit the check to his own general account for services performed, and was not bound to appropriate the amount to the payment of the draft, which, being dishonoured, B. and C. had a right to consider as a nullity. *Ingraham v. Hall*. xi. 78
2. Where a suit is brought for the use of a party who is discharged as an insolvent debtor pending the action, the court will permit such action to be marked for the use of the assignees, at the trial of the cause. *Ibid.*
3. A party cannot by assigning a part of his claim to another, divide an entire cause, nor by any means sustain more than one suit for it; and if two suits be brought, a recovery in the first is a conclusive bar to the second. *Ibid.*
4. As to the application of the rule, *quicquid solvitur, solvitur ad modum solventis*. *Ibid.*
5. General rules in relation to the appropriation of payments. *Harker et al. v. Conrad et al.* xii. 301

APPROVED PAPER.

On a sale for approved indorsed paper, the construction of law is *paper which ought to be approved*. *Guier and Diehl v. Page*. iv. 1

APPURTENANCES.

See DEED, 16.

ARBITRATION.

See ACCOUNT RENDER, 3, 4.

AGREEMENT, 10. APPEAL, 10, 18, 22, 25, 26. ARBITRATORS. ASSAULT AND BATTERY, 3. AWARD, 13, 23, 24, 25. BAIL, 1, 2. CORPORATIONS, 22. COSTS, 5, 16, 17, 19, 23, 24. ERROR, 13, 31, 53, 87. EVIDENCE, 207, 276, 279, 331. ILLEGAL DEMAND, 2. REFERENCE, PASSIM. WRIT OF ERROR, 9, 11, 14, 24.

1. One rule of arbitration was taken out in an action of ejectment and an action of covenant. The arbitrators awarded that they confirmed the article of sale, and allowed five dollars to the plaintiff as damage." The judgment was reversed for uncertainty in the award. *Kelly v. Dougherty*. i. 434
2. The court will not, upon exceptions filed, inquire into an award of arbitrators under the act of the 20th of *March*, 1810, unless the arbitrators have misbehaved in the execution of their duty. *Commonwealth v. Lafitte*. ii. 106
3. The court refused to set aside an award of arbitrators, because one of them, before the business was concluded, inquired of a stranger whether the defendant could pay a certain sum, in case the decision should be against him. *Rheem v. Allison*. ii. 112
4. The court has no power, under the act of the 20th of *March*, 1810, to appoint an arbitrator, in the room of one who had died pending the arbitration. *Girard v. Hutchinson*. ii. 188
5. Nor has it power to strike off a rule of arbitration against the consent of one of the parties. *Ibid.*
6. An award of arbitrators, when entered on the docket of the prothonotary, is a judgment upon which a writ of error lies; but although erroneous in point of law, it cannot while unreversed be annulled collaterally in another action. *Zeigler v. Zeigler*. ii. 286
7. When an award of arbitrators is in issue, the arbitrators may be examined to prove what they decided upon. *Ibid.*
8. If arbitrators do not meet on the day appointed, their proceeding afterwards is irregular. *Weir v. Johnston*. ii. 459
9. The affidavit required by the 11th section of the arbitration law of the 20th of *March*, 1810, to be made by

- the appellant, his agent or attorney may be made by the attorney at law of the appellant. *Anderson v. Tuler.* iii. 1
10. It is not error, that it does not appear by the record, that the defendant had notice of the time and place of meeting of the arbitrators. *Oppenheimer v. Comly.* iii. 3
11. If arbitrators have made a mistake by filing an award for the plaintiff in replevin, when they intended to find for the avowant, they cannot correct it by filing another award. *Christmas v. Thompson et al.* iii. 133
12. The court in which such award is filed may send it back to correct the mistake. *Ibid.*
13. In a suit against two executors, the rule of arbitration must be served on both, to render both liable, unless one has authority from the other. *Pedan v. Cox.* iii. 245
14. A service of a rule of arbitration on the defendant's wife, where it does not appear that she was at home at the time of the service, is not good. *Ibid.*
15. Where three suits are brought to the same term, on promissory notes, and distinct rules of arbitration taken out in each, and the same arbitrators are chosen in each, to meet at the same time and place, the arbitrators have no right to consolidate the actions and make one award without the consent of the defendant. *Groff v. Musser.* iii. 262
16. In a proceeding under the arbitration act, a declaration is not essential. *Sharp v. Kilgore.* iii. 387
17. An arbitration may be entered at any time after the commencement of the action. *Ibid.*
18. In trespass brought in the Supreme Court, no declaration was filed, and arbitrators awarded two hundred and fifty dollars. *Held*, on proof being made, that before the arbitrators the plaintiff's demand was for damages, amounting to thirteen thousand dollars, this court had jurisdiction. *Bazzire v. Barry.* iii. 461
19. The plaintiff, on taking out a summons, may proceed to arbitration, though the summons be not served. *Flanagan v. Negley.* iii. 493
20. *It seems*, that account render is not within the purview of the arbitration law. If it be, the arbitrators must not only perform the office of a jury, in case they deem the defendant liable to account; but also of creditors in settling the account. Therefore an award merely, that the defendant do account, is bad. *Jones v. Stratton.* iv. 76
21. An affidavit by an appellant under the 11th section of the act of the 20th of March, 1810, that it is not for the purpose of delay, such appeal is entered, but because he *believes* injustice has been done, is not sufficient. The affidavit must contain the word "*firmly*," applied to the appellant's belief, or something equal to it in substance. *Thompson v. White.* iv. 135
22. When the jurisdiction of the arbitrators has completely attached, the cause is out of court, and the court cannot inquire into the proceedings before the arbitrators; the only remedy is by appeal. *Ibid.*
23. The court may inquire of those things which the law requires to be done before the jurisdiction vests. *Ibid.*
24. If it should appear on the face of the award that the arbitrators had exceeded their jurisdiction, or that the award is contrary to law, it is subject to reversal on a writ of error, if the suit be pending in an *inferior court*, and if depending in this court, it may be set aside. *Ibid.*
25. *Query*, Whether an inferior court can set aside an award in such cases. *Ibid.*
26. A rule of arbitration, under the act of the 20th of March, 1810, is not vitiated by containing a submission of all matters in variance between the parties in the cause, instead of "all matters in variance in the cause between the parties." *Shoemaker v. Meyer.* iv. 452
27. Under the compulsory arbitration act, an award finding generally a sum of money for the plaintiff, but with a stay of execution till he should tender a conveyance from himself and wife, with special warranty of all their interest in certain lands, is not good. *Nicholas v. Wolfesberger.* v. 167
28. A rule of reference, under the arbitration act, of all matters in variance between the parties in the cause, does not vitiate the proceedings, the referees can act only in matters connected with the cause. *Ibid.*
29. Where a rule of arbitration is entered by the plaintiff in a suit against two defendants, he cannot proceed against one defendant only,

- and obtain judgment against him when he has not given notice to the other defendant of the rule for appointing arbitrators. *Berentz v. Bishop.* v. 179
30. If the appellant, on an appeal from an award of arbitrators, pay all the costs then taxed by the prothonotary, the appeal is valid though some of the costs have been omitted. *Fraley v. Nelson.* v. 234
31. The remedy for the costs omitted is, by order of the court for their payment, and attachment on non-compliance with such order. *Ibid.*
32. On appeal by the plaintiff from an award of arbitrators, it is not necessary that he should join in the recognition. *Boyce v. Wilkins.* v. 329
33. On appeal from an award of arbitrators, the costs of a former award in the same suit, which was set aside by the court, without imposing any terms, must be paid by the appellant. *Seely v. Barton.* v. 390
34. If the plaintiff, after a *capias* and bail bond, arbitrate the suit and obtain an award before the return day of the *capias*, special bail is dispensed with. *Phillips v. Oliver.* v. 419
35. Where an award of arbitrators, under the act of the 20th of March, 1810, is irregular, the party aggrieved has two remedies,—one by appeal, the other by writ of error. If he adopt the former, the cause is restored, as if it had never been arbitrated, except as to costs accruing on the appeal. Therefore this court will not, on a writ of error founded on errors in the trial in the court below, revise errors in the proceedings under the arbitration law. *Lentz v. Stroli.* vi. 34
36. A *scire facias* on a judgment, on a report of arbitrators, may be referred to arbitration under the act of the 20th of March, 1810. *Hill v. Crawford.* viii. 477
37. If there are several distinct suits between plaintiff and defendant, they may all be referred to the same persons, and a rule of court may be taken out in one of the suits, and an award made on it, unmixed with the others. *Todd v. Rough.* x. 18
38. It need not appear that service of notice of the appointment of arbitrators was proved, if it appear by the record that the defendant acknowledged service of the notice. *Kirk v. Eaton.* x. 103
39. *It seems* the court will not inquire whether, after the appointment of the arbitrators, the party had legal notice of their time and place of meeting, if the report of the arbitrators state that he had legal notice. *Ibid.*
40. If the prothonotary fixes the time of meeting of the arbitrators at a period less distant than the law prescribes, in the absence of the opposite party, and without his agreement, the judgment is erroneous. *Ibid.*
41. It need not appear in the proceedings of arbitrators, that they met on the day appointed for their meeting. *It seems* the court would presume, where nothing appeared to the contrary, that their first meeting was on the day appointed. *Kimble v. Saunders.* x. 193
42. It is not error that it does not appear in the proceedings of arbitrators, that the parties attended, or any hearing was had, or that the arbitrators were sworn or affirmed. *Negley v. Stewart.* x. 207
43. If the rule for the appointment of arbitrators be entered, and the declaration be filed the same day, the award is good, and the court will not inquire which was prior in time. The award of arbitrators in account render under the act of the 20th of March, 1821, must contain an account, showing the balance resulting in the sum awarded, otherwise it is bad. *Wright v. Guy.* x. 227
44. In account render between partners, an award of referees under the act of 1705, of a sum of money to the plaintiffs, payable by instalments, is good. *Geary v. Cunningham.* x. 230
45. One arbitrator, only, attending on the first day of meeting, has power to adjourn, though one party be absent, and at such adjourned meeting, (notice having been given to the absent party,) he may appoint other arbitrators in the place of those absent.
- It need not appear in the proceedings that such appointments were made without consulting the party present.
- An arbitrator present declining to act, because he conceives himself interested, may be considered as absent within the meaning of the act. *Stiles v. Carlisle and Hanover Turnpike Company.* x. 286
46. Where arbitrators award in favour of the defendant, and the plaintiff appeals, if he recovers, he is entitled to the costs which he paid on entering his appeal as well as those

which accrued since. The rule is the same when the award is for a sum in favour of the plaintiff, and he appeals and recovers a greater sum. *Commonwealth v. Shannon.*

xiii. 109.

47. In ejectment by vendor to recover back land sold but not conveyed, an award for a sum of money is bad. *Montgomery v. Patterson.* xiii. 150
48. Though a rule of arbitration be entered on a return day of the writ, and is therefore irregular under the arbitration act, yet the appearance of the defendant before the arbitrators and going into a defence, cures the irregularity and makes an award against him good. *Bosler v. Poe.*

xiii. 231

ARBITRATION AND AWARD.

See BAIL, 1, 2. ILLEGAL DEMAND, 2.

1. Upon an appeal from an award of arbitrators finding a sum of money to be due from the plaintiff to the defendant, if, on the trial in the court below, the plaintiff refuse to submit to a nonsuit on the recommendation of the court, it is error to refuse to permit the defendant to give a set-off in evidence, on the ground that the plaintiff has not supported his case. *Lewis, surviving Executor of Lewis, v. Culberson, Administrator of Vanlear.* xi. 59
2. If the plaintiff after having entered an appeal from an award of arbitrators, suffer a voluntary nonsuit, the award becomes an absolute judgment. *Hostetter et al. Kaufman.* xi. 146
3. In an action on a joint and several bond, against one of the co-obligors, in which the defendant relied upon an award of arbitrators, in a suit brought on the same bond against the administrators of a deceased co-obligor, finding that the plaintiffs had no cause of action, from which award an appeal was entered, but the plaintiffs upon the trial of the appeal suffered a voluntary nonsuit: held that the plaintiffs could not show that the nonsuit was suffered by surprise, in consequence of a witness for the defendant in that suit having sworn to a fact which if true was fatal to their cause of action, but who, it had since been discovered, was perjured. *Ibid.*
4. An award of arbitrators in full force, in favour of a defendant in a suit on a joint and several bond against one of the co-obligors, is a bar to a subse-

quent action on the same bond against another co-obligor. *Ibid.*

5. If an appeal from an award of arbitrators be withdrawn, the award becomes an absolute judgment. *Swan v. Scott.* xi. 155
6. If the party appealing from an award of arbitrators, pay all the costs which are taxed at the time of the appeal, the appeal is good, though other costs are taxed within the 20 days of which he has notice. *Steward v. Jewell.* xi. 359
7. The arbitration act of the 20th of March, 1810, does not embrace actions founded upon penal statutes. Therefore if the defendant arbitrate the cause, and upon an award being filed against him, enter an appeal, and the verdict, on the trial of the appeal, be for a less sum than the award, it nevertheless carries costs. *Buckwalter v. The United States.* xi. 193

ARBITRATION LAW.

That part of the 11th section of the act of the 20th of March, 1810, which requires the payment of costs before the entry of an appeal, does not violate the constitution. *M'Donald v. Schell.* vi. 240

ARBITRATORS.

- See APPEAL, 17, 18, 28, 29. ARBITRATION, PASSIM. AWARD, PASSIM. COSTS, 5, 16, 17, 19, 21, 23, 24. ERROR, 13, 31, 53, 87. PRACTICE, 4, 27.
1. Arbitrators need not reduce their proceedings to writing; but if they do and on the face of them it appear that they have acted illegally, it is error. *M'Entire v. M'Elduff.* i. 19
2. When a majority of the arbitrators attended, they may proceed to supply the place of one who does not attend, even in the absence of the defendant, if no sufficient excuse be made for his absence. *Ibid.*
3. It is not necessary that arbitrators should be sworn before they adjourn. *Boone v. Reynolds.* i. 231.—*Eckert v. Sheetz.* vi. 275
4. If the award be not transmitted within seven days to the prothonotary, the arbitrators merely forfeit their pay, but the award is not void. i. 231
5. In a proceeding before arbitrators there is no reason for a declaration or statement, if the parties think proper to go on without it. *Frey v. Vanlear.* i. 435
6. Arbitrators adjourned to a day cer-

tain, and did not meet on that day; but met at a subsequent day, examined a witness in the absence of the party, and without notice of the meeting, and made award: *Held* that their proceedings were irregular and the judgment reversed. *Ibid.*

7. If two causes between the same parties are investigated and decided by the same arbitrators at the same time, they are entitled to be paid only for the number of days actually spent in the investigation of both cases, and cannot make a distinct charge for each case. *Girard v. Hutchinson.* iv. 81
8. If one arbitrator only attend at the time and place appointed for their first meeting, he may adjourn without appointing other arbitrators in the place of those who are absent, if neither party request that their places may be filled by a new appointment; and an award afterwards made by the original arbitrators is good. *Stealy v. Irvine et al.* vi. 128
9. It is no objection to an award of arbitrators that the defendant had no notice of the adjournment made at their first meeting, if he attended at the prothonotary's office when they were appointed. *Eckert v. Sheetz.* vi. 275
10. When notice of the time and place of appointing arbitrators under the act of the 20th of March, 1810, has been served on two only out of three defendants, the prothonotary has no authority to appoint arbitrators for all the defendants. *Marshall et al. v. Lowry et al.* vi. 281

ARRAIGNMENT.

See INDICTMENT.

ARREST.

1. A witness attending before a magistrate to give his deposition under a rule of the court in a suit depending, will be discharged, if arrested on his return from the magistrate's office, under a writ from the District Court of the United States, in a suit for penalties. *United States v. Edme.* ix. 147
2. Such application may be made in the absence of the defendant, on the affidavit of his attorney and after bail given. *Ibid.*

ARTICLES OF AGREEMENT.

See ACTION, 28. AGREEMENT, 8, 9. DEED, 11. EVIDENCE, 40, 41, 190, 191. JUDGMENT, 1, 2, 27. PLEADING, 9, 20, 34, 49.

Articles of agreement for the sale of land are evidence, notwithstanding a deed afterwards executed under them, in a suit on bonds given in pursuance of the articles, to show, that the bonds were given for certain lands and that the articles contained a stipulation that the bonds should not be paid without six months' notice, which circumstance was concealed from the defendants, who were sureties in the bonds. *Anderson's Executors v. Long.* x. 55

ASSAULT AND BATTERY.

See INDICTMENT, 22, 27, 42.

1. If a man raise his hand against another, within striking distance, and at the same time say, "If it were not for your grey hairs," &c. this is no assault; because the words explain the action and take away the idea of an intention to strike. *Commonwealth v. Eyre.* i. 347
2. On a conviction for an assault and battery with intent to kill, a sentence to be confined in the jail and penitentiary house of the city of Philadelphia for the term of three years, "to be fed and clothed in the manner pointed out by the act of assembly in such case made and provided" is erroneous. *Scott v. The Commonwealth.* vi. 224
3. In an action of assault and battery, if the plaintiff die after an appeal by the defendant from an award of arbitrators in favour of the plaintiff, his representatives cannot be substituted, and the award is at an end. *Miller v. Umbehauer.* x. 31

ASSESSOR.

See EVIDENCE, 258. OFFICER, 3.

ASSIGNEE.

See ACTION, 17. ADMINISTRATOR, 13. CONNECTICUT TITLE, 4, 8.

1. Covenant by an assignee of the reversion under the statute 32 Henry 8th, c. 34, is transitory; but debt by an assignee of the reversion is local. *Hemwood v. Cheeseman.* iii. 500
2. Assignees under a commission of bankruptcy issued in England, cannot support an action in their own names; but, it seems, if no adverse claim appears, they may be marked as the *cestui que use* of a judgment, obtained in the name of the bankrupt as plaintiff, and the defendant cannot object to payment on that ground. *Byrne v. Walker.* vii. 483
3. Where the assignees of a debtor have sold the property, and received

- money enough to pay all the debts of the assignor, an action will lie against them, (if all have received the money, and all are equally liable,) to compel payment to a creditor, whose claim against the assignor is established. *Rush v. Good.* xiv. 226
4. But whether an action can be supported for a proportion or rateable share of the debt claimed by the plaintiff, until he has proceeded against the assignees, so far as to have a dividend declared and distribution ordered, as directed by the act of the 24th of March, 1818, "to compel assignees to settle their accounts," &c. *quære?* *Ibid.*
5. A count against such assignees, setting forth the assignment, naming the defendants as trustees, and averring that they had collected money enough to pay all the debts of the assignor, may be joined with a count for money had and received, in which the defendants are not named as trustees; both counts charging them personally. *Ibid.*
6. But under such a declaration, the plaintiff can only recover the money actually received by the defendants, and not what with due diligence they might have received. *Ibid.*
7. If several papers purporting to be accounts of the assignees of a debtor, or some of them, be found together in the prothonotary's office, one of which papers purports to exhibit the property unsold, a second the property sold, a third the sums paid to the different creditors, a fourth the debts still due, &c., and they were all filed at the same time, they make together but one account; and if one of them be given in evidence against the assignees, it makes the others evidence for them; and this whether they are considered public or private papers. And if it be alleged, that one of the papers was made out since the commencement of the suit, and this does not distinctly appear, the whole should go to the jury, with directions to disregard the one objected to, if they should be of opinion that it was not put in with others, before the commencement of the suit. *Ibid.*
- ASSIGNMENT.
- See APPRENTICE, 1, 6. ASSUMPSIT, 2, 6. BILL OF EXCHANGE, 4, 12. EJECTMENT, 69. EVIDENCE, 187, 245. FRAUD, 7. INSOLVENTS, 1, 2, 5, 6, 9, 12, 15. RELEASE, 6, 11. SET-OFF, 9, 13, 14, 17.
1. A. and B. partners in trade, conveyed to C. "all their, the said A. B's. real and personal estate, whatsoever and wheresoever, &c." in trust to sell the same, collect the debts due to the *partnership*, and out of the proceeds of the sale and the debts collected to pay the debts of the *firm*. The deed recited an intention to provide for the payment of the *joint* debts; but nothing was said of an intention to pay the separate debts of either partner, and throughout the instrument their names were mentioned *together*. At the time of the assignment the *partnership* did not hold any real property; but A. was the owner of a real estate in his *separate* capacity. Held that the separate real estate of A. passed by the assignment. *Wharton v. Fisher.* ii. 178
2. Where a bond has been assigned agreeably to the act of the 28th of May, 1715, a payment made by the obligor to the obligee before notice of the assignment is good. *Bury v. Hartman.* iv. 175
3. Where an assignment was made "in trust to pay the debts due the following persons, viz:" and then followed the names and debts; and a debt due one creditor was put down "about 11,000 dollars," which was in fact upwards of 13,000 dollars, held that the trust included the latter sum. *Browne v. Weir.* v. 401
4. H. and Co. endorsed four promissory notes amounting together to \$2053 57, for the accommodation of the firm of C. A. and I. which were delivered to F. and W. for goods sold by the latter to C., A. and I. Before the notes became due and while they were in the hands of F. and W., C., A. and I. made an assignment in trust to pay, "1st. The following named *persons* (naming them) the following sums, &c. for money lent, &c." 2d. To pay and satisfy the following named *persons*, the following sums, being for *notes lent and endorsements*, to wit; H. and Co. \$2053 57; to F. and W. \$6490. Preferences were given to several other persons by name. It was provided by the assignment that no one of the debts should have any preference or priority in the order of payment, but should be paid rateably and in equal proportions, according to their respective amounts out of the monies to be recovered until the whole should be paid and satisfied. It also

- contained a proviso that no one of the *persons*, creditors preferred and named as aforesaid, should recover their proportions upon whose paper the assignors should be or remain endorsers until they should have taken up the said notes or otherwise freed them from their responsibility as endorsers. On the day of the date of the assignment, F. and W. executed a release to the assignors. At the time of the execution of the assignment, C. A. and I. were not indebted to H. & Co. who, on the contrary were indebted to the assignors. *Held* that the preference was not given to H. and Co. personally but to the four notes endorsed by them, and that F. and W. in whose hands they were, might recover the amount of them in an action brought in the name of H. and Co. for their use. *Heilner et al. v. Imbrie et al.* vi. 401
5. Assignment by a debtor to trustees in trust, first for the payment of specific debts, secondly for the payment of all the other debts of the assignor (except notes and endorsements made by him for the accommodation of others) in full, if the money be sufficient; if not, then in just and equal proportions; and after paying the debts of the second class, then thirdly to pay certain others; and if any surplus should remain, then to pay the same to the assignor, his executors, &c.: provided, that before payment of any of the said debts, the creditors should release within a certain period. *Held* that a creditor of the second class who did not release within the period prescribed, was not entitled to a dividend, notwithstanding he executed a release before the assignees had declared or paid a dividend, and a surplus remaining after paying the second class of creditors. *Cheever v. Imlay.* vii. 510
6. If creditors release under an assignment by the debtor, in trust to pay their respective demands in full, the surplus to go to the debtor and the fund prove sufficient to pay the whole debt and part of the interest up to the payment of the last dividend, they are entitled to receive such interest. *Scott v. Morris.* ix. 123
7. An assent to an assignment to absent persons will be presumed, when it is made for a valuable consideration, and is beneficial to them. *North v. Turner.* ix. 244
8. An assignment of personal property by which the right of property passes, draws after it a constructive possession on which the assignee may maintain trespass. *Ibid.*
9. If a debtor assign his property to a creditor in consideration of a debt really due, upon a secret trust that he shall receive a benefit, either by a return of part of the property, or a loan of it on beneficial terms, and the transaction, taken altogether, has a direct tendency to protect the property of the debtor from other creditors, the assignment is fraudulent and void. *Passmore et al. v. Eldridge et al. Assignees of Brown.* xii. 198
10. Where an assignment described certain property in so vague a manner that it was impossible to say whether it was comprehended in the assignment or not; *held* that a notice, before the interest of any third person had attached, to the person in whose hands the property was, given by one of the assignees, that the property had been assigned to them, by deed of a certain date, and requesting him to consider it for their use and subject to their order, to which was attached a writing signed by the assignor: "I confirm the above," though not an original appropriation, amounts to a declaration, identifying the property intended to pass by the deed; and that therefore it was error to instruct the jury that such a paper was no more than a construction by the parties of the original assignment and of no more weight than that of any other persons. *Ibid.*
11. Assignment by B. B. of all the effects of the late firm of Y. and B., B. B. and Co., and of B. B., in trust to pay such creditors of the late firm of Y. and B., and of B. B. and Co., as shall release all claims against the said late firm of Y. and B. and against the said B. B. and Co., within a certain time, the plaintiff, a creditor of B. B. and Co., executed a release within the time prescribed of all claims against the firm of B. B. and Co. *Held*, not to be conformable to the provisions of the assignment. *Sheepshanks et al. v. Cohen et al.* xiv. 35
12. The Pennsylvania Agricultural and Manufacturing Bank, in part payment of their banking house by

them sold to T. and I. H., received an assignment from one who was himself the assignee of a judgment, against W. and M. B.; the assignors of the judgment in both instances guarantying its payment. Between the date of the first and second assignment, other judgment creditors of W. and M. B. had sold their property, and a surplus from the proceeds was left in the sheriff's hands. *Held*, that whether or not the second assignor was liable on his guarantee, before the bank proceeded against the sheriff, depended on whether the bank, at the time of taking their assignment, knew of the execution issued and proceedings thereon. *Harwood v. Ramsey.* xv. 31

ASSIGNMENT IN TRUST FOR CREDITORS.

Assignment in trust to pay creditors of the first class their debts, creditors of the second class their debts, the payments to be made rateably in proportion to their respective demands, and creditors of the third class, in the same terms as those of the second; provided, that no creditor should be entitled to receive a dividend unless he executed a release in 30 days. There being funds sufficient to pay the creditors of the first and second class in full, and a dividend to those of the third class. *Held* that a creditor of the first class not releasing, was not entitled to judgment. *Wilson v. Kneppley.*

x. 439

ASSIGNMENT OF BREACHES.

See JEOFAIL.

In a suit on an administration bond, it is sufficient, after verdict, if one of the breaches is well assigned; for the penalty is then forfeited. *Carl v. The Commonwealth.* ix. 63

ASSUMPSIT.

See ACTION, 1, 14. BANKRUPT, 2, 3. CONSIDERATION, 1, 2, 3. EVIDENCE, 82, 123, 127, 331. FORMER RECOVERY, 1, 2. JOINT CONTRACT, 1. JOINT SUIT, 1, 2, 3. PARTNERS, 9. PARTNERSHIP, 1. RESTITUTION, 3.

1. When the defendant applied to A. and requested him to pay to B. out of the money of the plaintiff, or of other persons expected to be in his hands a sum of money, for the use of the defendant, and A. did apply the money of the plaintiff to the use of the defendant in a payment to B., the law will raise an assumption. In

such a case, if the defendant was under a misapprehension, as to the funds from which the payment to B. was made, no interest should be allowed further back than the demand of the plaintiff. The rule is, to allow interest when the defendant has retained the money unlawfully and against his consent. *Brown v. Campbell.* i. 176

9. *Assumpsit* lies against a corporation on an implied contract. *Overseers of North Whitehall v. Overseers of South Whitehall.* iii. 117
3. Where a pauper was chargeable to a township which was divided, it was held that the overseers of the poor of one of the townships, which maintained him after the division, might sustain *assumpsit* against the overseers of the poor of the other township for a rateable proportion of the expense of maintenance. *Ibid.*

4. An agreement by the defendant to pay the plaintiff a certain sum *per diem*, is good evidence in *indebitatus assumpsit* for work, labour and services. *Miles v. Moodie.* iii. 211

5. If the defendant occupied land, by the consent and permission of the plaintiff, the jury may presume a promise to pay a reasonable rent. *Henwood v. Cheeseman.* iii. 500

6. *Assumpsit* lies here for the use and occupation of land in *Jersey*. This action is founded on privity of contract, not of estate. *Ibid.*

7. *Assumpsit* for work, labour and services, does not lie to recover pilotage, where the plaintiff left the vessel by the master's order, though the master agreed to pay him the pilotage, if by law he was entitled to it. The declaration should be on special agreement. *Donaldson v. Fuller.* iii. 505

8. A. requested B. to guarantee a note in his place, and warranted the payment. Just before the note became due he cautioned B. to see the note paid or protested, and declared, that if renewed, he would have nothing to do with it. B., notwithstanding, renewed the note for a part with an additional endorser, part having been paid by the drawer. A. afterwards being told what was done, said to the holder "never mind, I will pay it; and, speaking of the additional endorser, said, "he is as good as the bank and I will warrant the payment." This note not being paid, it was protested and paid by B. *Held.*

- that in a suit by B. against A., there was no error in the judge's leaving it to the jury, that in case they thought the plaintiff's proceedings had been ratified he might recover in an *indebitatus assumpsit*, for money paid to the use of A. *Hassinger v. Solms*. v. 4
9. An agreement to forbear to sue for a debt, payable in *futuro*, is a good consideration for a promise, by a third person, to pay such debt. *Johnes v. Potter*. v. 519
10. If a father holds a legal title to land in trust for his son, and they agree to sell the land, and the father receives the purchase money, and promises to pay the debts of his son, a creditor of the son, who had previously obtained judgment against the son, and levied on the land, may sustain *assumpsit* for money had and received, against the father. *Fleming v. Alter*. vii, 295
11. Laying a consideration executed in *assumpsit*, without a previous request, is bad on demurrer, but is cured by verdict. *Stoever v. Stoever*. ix. 434
12. On a mortgage of land, with authority to the mortgagee to sell after a certain time, and to pay the surplus, if any, after satisfying the debt to the mortgagor, if there is no covenant or special agreement to pay, *indebitatus assumpsit* lies for money had and received for a surplus arising from the sale. *Ibid*.
13. One tenant in common cannot maintain *assumpsit* against another to recover back the price of certain ore paid by the former to the latter, under the mistaken supposition that the latter had an exclusive title to the land where the ore was dug, the proper remedy is account render.
14. *Indebitatus assumpsit* will not lie by a person claiming title against one who enters on land as a trespasser, and receives the profits, to recover their value.
15. It seems that money paid voluntarily, by one knowing or having the means of knowing his rights, cannot be recovered back by him. *Irvine v. Hanlin*. x. 219
16. Counts in *assumpsit*, stating promises to the plaintiff, as administratrix, may be joined in the same declaration with counts stating promises to the intestate in his lifetime. *Stevens v. Gregg*. x. 234
17. The plaintiff cannot recover in *indebitatus assumpsit* for work and labour, the amount stipulated to be paid him by the defendant by a special agreement for services to be done, during a certain time, when the plaintiff has not performed the services, but has been discharged by the defendant before the time expires, and is thereby prevented from performing them: he must resort to an action on the special agreement. *Algeo v. Algeo*. x. 235
18. If a creditor for goods sold, &c. receive a chose in action as a collateral security, and payment is not obtained from it, he may recover on the general assumption, and is not obliged to resort to an action on the special agreement, under which the security was received. *Leas v. James*. x. 307
19. Declaration in *assumpsit* against executors, stating that the testator covenanted, if he died first, that the plaintiff should have a certain portion of his estate, that such portion came to defendant's hands after his death, and they promised as executors to deliver it to plaintiff. *Held*, that sealed articles of agreement between the plaintiff and testator, by which the latter entered into the covenants stated in the narr, were not evidence. *Landis v. Urie*. x. 317
20. In an action of *indebitatus assumpsit*, evidence cannot be given of a sale of a growing crop. *Executor of Lewis, surviving partner of Long, v. Culbertson, Adm. of Vanlear, &c.* xi. 48
21. A count setting forth that A., in consideration that B. at his special instance and request, would become bound to C. by his writing obligatory, in the sum of \$2000, conditioned for the payment of \$1000 on a certain day, assumed upon himself, and promised the said B. to indemnify him, and save him from all loss by the said writing obligatory; and then averring that B., giving credit to the said assumption, did become bound to the said C. in the bond above described, and that A. had failed in the performance of his promise. Suit having been brought on the bond, and B. having been compelled to pay the money mentioned in the condition, is good, without stating on what account the bond was given. *Bull v. Allen et al. Ex'r. of Allen*. xi. 52
22. A count stated that A., being a Manager and President of the *Little Conestoga Turnpike Company*, and

B. being agent of the Company, and a loan of money having been negotiated with C., for the use of the Company; A., in consideration that B. would become bound to C. in a writing obligatory, (such as is described in the first count,) promised to indemnify him; and that B., trusting to his promise, did become bound, &c. A breach was then set forth, as in the first count. *Held*, that this count set forth a sufficient consideration. *Ibid.*

23. A. being manager and president of a Turnpike Company, and B. being agent of the company, and a loan of money having been negotiated with C. for the use of the company, A. in consideration that B. would become bound to C. in a bond, conditioned for the payment of 1000 dollars, on a certain day, promised to indemnify him, and save him harmless from all loss which might accrue from his having executed the bond. B. received from C. \$1000, for which he gave him his bond, and B. paid the money to the treasurer of the company, for which he received their bond payable to himself. This bond was afterwards given up by B., and the debt of one thousand dollars, as well as other debts to other persons, included in another bond for ten thousand dollars, given by the company to K. and H. It was alleged by the plaintiff, that this bond for ten thousand dollars was given to K. and H. in trust for the several persons whose debts were included in it, but of this there was no positive proof, neither was it proved that B. transferred the company's bond for one thousand dollars to K. and H. or that he received any other consideration for giving it up than the bond to K. and H., in which it was included. *Held*, that B., by receiving the bond from the company, did not discharge A. from his assumption.

Held, also, that it was not error to refuse to charge the jury, that putting the amount of the bond for one thousand dollars into the bond for ten thousand dollars, and giving up the former, and amalgamating that money with the money of others, was a discharge of the defendant from all liability upon any promise to indemnify which had been proved. Whether the large bond was taken in trust for B. and other persons whose debts were covered by it, was a sub-

ject of inquiry for the jury. It was also a subject of inquiry, whether the defendant was privy to the giving up of the bond of one thousand dollars by B., and assented to it; for, if he did assent to it, he was not discharged from his responsibility, though it seems he would have been discharged if the first bond had been given up, and the second taken without his knowledge. *Ibid.*

24. Where a judgment creditor, in pursuance of an arrangement with the debtor, purchases the real property of the latter, through an agent to whom the conveyance was made, and who in turn conveys to the judgment creditor, no money having been paid by any one, and the judgment on the trial of an issue, directed for that purpose, having been found collusive and vacated, the trustee to whom all the property of the debtor has been assigned under the insolvent law, cannot maintain an action against the purchaser for money had and received, to recover the nominal price for which the property sold at auction. *Huntsecker v. Heiney*. xi. 250
25. If the sale is fraudulent as regards creditors, the trustee may recover the property by ejectment; or if he chooses to affirm the sale, and go for the purchase money, he may proceed by *assumpsit* on the special contract, unless the price has been secured by specialty. *Ibid.*
26. The assignment of a judgment, in the absence of express warranty or fraud, gives rise to no implied *assumpsit* on the part of the assignor. *Jackson v. Crawford*. xii. 165
27. A promise by a debtor, after the execution of a voluntary release under seal by the creditor at the debtor's request to pay the balance of the debt, is founded on a sufficient consideration, and is binding. *Willing v. Peters*. xii. 177
28. In a suit for not executing a bond which the defendant promised the plaintiff, in consideration of having seduced her, and begotten on her body a bastard child, the whole money for which the bond was to be given is recoverable: there can be no subsequent suit for such money. *Shenk v. Mingle*. xiii. 29
29. *Indebitatus assumpsit* lies to recover back money obtained by the defendant from the plaintiff *mala fide*, or by deceit. *Mathers v. Pearson*. xiii. 258
30. If, upon the execution of an assign-

ment of a bond and mortgage under seal, and in the presence of two witnesses, which neither contains a guarantee of the sufficiency of the mortgaged premises and the solvency of the mortgagor, nor states that it is without recourse to the assignor, the assignor declare, that the mortgaged premises are worth double the sum for which they are mortgaged, that the mortgagor is solvent and able to pay the debt, and that, if he should fail to do so, he, the assignor, will be accountable for it, and, upon being requested by the assignee to have the guarantee reduced to writing, he reply, that it is unnecessary, that there are witnesses present who can establish the fact, an action of *assumpsit* may be maintained by the assignee against the assignor upon this parol guarantee. *Overton v. Tracey.* xiv. 311

31. It is no objection to such an action, that no notice was given to the assignor of the failure of the mortgagor to pay the debt, or of the sale under the mortgage: unless it appear that the assignor was prejudiced by want of notice, or could have received any benefit from notice. *Ibid.*

ATTACHMENT.

See ARBITRATION, 31. ERROR, 12. PRACTICE, 20. REGISTER'S COURT, 1.

1. A proceeding by attachment against a vessel, under the act of the 9th of February, 1793, is a civil action, within the meaning of the act of the 30th of March, 1811; and, after the passing of that law, ought to have been transferred from the Common Pleas to the District Court. *Ship Portland v. Lewis.* ii. 197
2. Appearance to a foreign attachment, entry of special bail to dissolve the attachment, and confession of judgment by the defendant for a smaller sum than the amount claimed, are not a waiver of the right of the defendant to maintain an action against the plaintiff in the attachment, for maliciously and wrongfully suing out a writ of foreign attachment against him, when he was not within the purview of the attachment laws. *Foster v. Sweeney.* xiv. 386

ATTACHMENT, DOMESTIC.

See WRIT OF ERROR, 12.

ATTACHMENT, FOREIGN.

1. Where money is attached in another state, the judgment of the courts

of that state, founded on their own laws, touching the disposition of the money, is conclusive. *Moore et al. v. Spackman.* xii. 287

2. And where both the defendants in the attachment, and their general assignees are permitted to become parties to the suit, put in their claim to the property, and are heard on the merits of the case, it ceases to be an *ex parte* proceeding, and the defendant and their assignees are bound by the judgment of the court. *Ibid.*
3. If one who has received a bill of exchange for collection, with an engagement to pay off a certain proportion on advice of its acceptance, and the balance on advice of its payment, remits it to his correspondent in *New Orleans*, with instructions to collect it for his account, and afterwards, in consequence of the expected insolvency of the party from whom he received the bill, directs the money to be attached in the hands of his correspondent, in order to secure a debt due to a foreign merchant, for whom he is agent, there is nothing fraudulent in the transaction. If there had been any fraud, it was the duty of the defendants in the attachment, who had intervened and become parties to the proceeding, to allege the fraud in the court in which the action was depending. *Ibid.*
4. In decreeing that the money attached should be paid to the plaintiff in the attachment, the court at *New Orleans* by plain inference decided, that it was not the property of the person who had received the bill for collection. But if his correspondent suffered judgment to go against him by fraudulent collusion with the plaintiff in the attachment, it would have presented a different case. *Ibid.*
5. If after the order to lay the attachment, but before it was laid, the person who gave the order received notice of a general assignment, by the party from whom he had received the bill for collection, it was not contrary to law to continue the attachment for the benefit of a person who was not a citizen of *Pennsylvania*. *Ibid.*

ATTAINDER.

The land of one attainted of treason by the act of the legislature of *Pennsylvania* of the 6th of March, 1778, is not restored to him or his heirs by the 6th article of the treaty of peace with *Great Britain*, though the state

has not sold the land, nor even known its position. *Dietrich v. Mateer.*

x. 151

ATTORNEY.

See ACTION, 22. AGENT, 1. DEED, 9.

SHERIFF'S SALE, 2, 3.

1. Under the rule of this court which requires that no person shall be admitted an attorney of the court, unless he has served a regular clerkship within the state "to some practising attorney or gentleman of the law of known abilities," a clerkship to a judge of this court, or to the president of one of the courts of common pleas is sufficient; and the construction should be the same, were the expression, "or gentleman of known abilities." *Commonwealth ex rel. Brackenridge v. Judges of the Court of Common Pleas of Cumberland county.* i. 187

2. An act done by an attorney is valid, if it appears he did it as attorney, whether it be done in the principal's name, or in the attorney's, as such. *Fulweiler v. Baugher.* xv. 45

ATTORNEY AT LAW.

See PRACTICE, 17, 35.

1. A suit cannot be sustained by a gentleman of the bar against his client for a compensation for services, over and above the attorney's fee allowed by act of assembly. But if a client gives a note or bond for such compensation, an action lies thereon. *Mooney v. Lloyd.* v. 412
2. An attorney at law, on record, is authorized to do those things only which pertain to the conducting of the suit; and has no power to make a compromise by which land is to be taken instead of money. *Huston v. Mitchell.* xiv. 307

ATTORNEY IN FACT.

See DEED, 9.

AUCTION.

See VENDOR AND VENDEE, 1.

AUCTIONEER.

See WITNESS, 6.

1. It is not lawful for an auctioneer to place goods intended for sale, in the public streets. *Commonwealth v. Passmore.* i. 217
2. Supposing the corporation of the city to possess the right of authorizing a nuisance, the ordinance of January 18th, 1790, merely exempts auctioneers from the penalties imposed upon others who obstruct the streets, and leaves the law, as to them as it was before. *Ibid.*

3. Query, Whether an action to recover the price of goods sold at auction, can be sustained in the name of the auctioneer only? *Harris v. Smith.* iii. 20

4. If goods are sent to auction, with directions to the auctioneer to dispose of them at a certain average advance on the invoice price, and he sell them for less than the limited price, an action may be maintained against him for the difference between the limited price and that for which the goods were sold. *Steele et al. v. Ellmaker.* xi. 86

5. An auctioneer, who, in addition to his registered auction store, has a separate establishment for the sale of household furniture, is liable to indictment under the act of the 29th of March, 1824. *Wood v. Commonwealth.* xii. 213

AUDITORS.

See JUDGMENT, 9. ORPHANS' COURT, 10.

- The compensation to the auditors of the county of Philadelphia for settling the accounts of the guardians of the poor of the city and districts is to be paid out of the county treasury. *Commonwealth ex rel. Patton v. County Commissioners.* ix. 251

AVERAGE.

See INTEREST, 7.

1. Where a vessel is voluntarily run on shore with a view of preserving, as far as possible, both ship and cargo, and in consequence thereof is lost, the loss is to be repaired by a general average. *Gray v. Wahn.* ii. 229
2. The value of a vessel, lost under circumstances which entitle her to contribution, in general average, is to be estimated at the price she would have borne in the place where the voyage commenced, deducting the expense of carrying there, and making a reasonable allowance for any deterioration she may have suffered, up to the time when the loss happened. *Ibid.*

AUTHORITY.

- See AGENT, 1, 4, 9; 10. COUNTY COMMISSIONERS, 3, 9, 10. EVIDENCE, 140. PAROL SALE, 1, 2, 3.
- A. by deed granted to the proprietors of lots in the town of B. a piece of land "to be applied only for public uses, for the benefit of the present and succeeding inhabitants, to be by the proprietors of lots in the said town, applied and improved in the

persons of their delegates or trustees, or otherwise, as a majority of the said inhabitants may from time to time order and direct, and for no other purpose whatsoever." It was held, that a lease for ten years, made by the burgess and council, (the town having been incorporated after the grant,) with the approbation and consent of a majority of the inhabitants, to an individual who was to erect a warehouse on the premises, and at the expiration of the term deliver it to the lessors in good order, was within the scope of the powers granted by the deed. *Gregg v. Irish et ux.* vi. 211

AWARD.

See APPEAL, 15, 16, 21. ARBITRATION, 1, 2, 3, 6, 7, 20, 24, 25, 46, 47. ARBITRATORS, 8, 9. COSTS, 5, 16, 17, 19, 21, 23, 24. ERROR, 31, 53, 87. PAROL EVIDENCE, 8. PRACTICE, 4. REFEREES, 1, 2.

1. The mere entry of an appeal by a plaintiff from an award of arbitrators, does not annul the award, if he afterwards suffers a nonsuit. *King v. Sloan.* i. 77
2. An appellant may relinquish his appeal, and in that case the award remains in force. *Ibid.*
3. An award of referees in ejectment is not conclusive of title. *Duer v. Boyd.* i. 203
4. An award for more than one hundred dollars, by referees appointed in an amicable suit, before a justice of the peace, is not a good award, either under the act of assembly or at common law. *McKillip v. McKillip.* ii. 489
5. An award under a voluntary submission, that the party should give security for the payment of certain sums of money to A., or her agent, if required, is void for uncertainty. *Barnet v. Gibson.* iii. 340
6. In an award, the sum for which judgment is to be entered, must be expressly mentioned, or reference be made to something extrinsic, by which it may be ascertained. *Burkholder v. McFerran.* iii. 421
7. A writ of error lies on the report of arbitrators appointed under the act of the 20th of March, 1810. *Sicard v. Peterson.* iii. 468
8. An award by such arbitrators of a sum of money to the plaintiffs, "on condition of giving possession to the defendant of the goods, chain machinery, and other articles, belong-

ing to the factory, lately under the direction of the plaintiffs," is void for uncertainty. *Ibid.*

9. An award in a suit on a policy of insurance, that proof had not been produced, sufficient to establish a claim against the defendant, is as much as saying, that the plaintiff had no cause of action, and is final and conclusive. *McDermott, v. U. S. Ins. Co.* iii. 604
10. An award having been made in two actions submitted to the same arbitrators, the court set it aside. *Comm. v. Maris.* iv. 81
11. An award ought to be certain and final. If arbitrators award a sum of money to be paid as the consideration of a tract of land, and add that all the legal and equitable claims against the land, are to be deducted from the award, without finding the amount of such claims, the award is bad. *Spalding v. Irish.* iv. 322
12. An award directing money to be paid by instalments is bad. *Shoemaker v. Meyer.* iv. 452
13. If two defendants enter a rule of arbitration and an award be given against one only, the construction of law is that it is in favour of the other. *Lents v. Stroh.* vi. 34
14. An award of arbitrators finding for the plaintiff a certain sum, "to be paid at the time the plaintiff will make a correct deed of conveyance to the heirs of J. M. for two and a half acres of land," without describing the land, is bad for uncertainty. *Murray's Administrators v. Bruner.* vi. 276
15. An award by arbitrators appointed by the agreement of some of the children of an intestate, and the husbands of some others, directing one of the parties to the submission to take the land of the intestate at the appraisement and to pay a certain sum to the children of the intestate, is bad; because it cannot vest the land in such party without a conveyance, which is not directed; and because the husbands submitted without their wives. *Miller v. Moore.* vii. 164
16. If, by an agreement in writing to refer under the act of 1705, it be stipulated that the award shall be under the hands and seals of the arbitrators, an award under their hands without their seals, is bad. *Rea v. Gibbons.* vii. 204
17. Referees under the act of 1705, are not authorized to find the facts spe-

- cially, and submit the law to the court. The report must be good *per se* to justify the entry of judgment upon it. *Sutton v. Horn*. vii. 228
18. If an award of referees in the court below, is good on its face, the court will not on a writ of error inquire into exceptions made to the proceedings of the referees as to matters of fact or of law before them; and if the evidence and documents on these points are blended by the court below, with the record returned, this court will pay no regard to them. *Harker v. Elliott*. vii. 284
19. In an action against executors on a joint bond, given by the testator and another, the defendants pleaded a former recovery. *Held*, that an award made by arbitrators in a former suit on the bond against both obligors, in which an appeal was entered, but the defendant's testator died, during the pendency of the appeal and the other defendant disavowed it, supported the plea. *Reed v. Garwin's Executors*. vii. 354
20. An award in favour of the plaintiff, of a sum of money, and of several judgments, the amounts and dates of which are mentioned, together with interest, is sufficiently certain. *White v. Jones*. viii. 349
21. The court have no power to alter an award of arbitrators, even if it be illegal on the face of it. If, therefore, arbitrators award costs to a party who is not entitled to them, the court cannot enter judgment on the award without costs. *Post v. Sweet*. viii. 391
22. A suit may be maintained on a bond conditioned to perform an award of arbitrators, though the award was given in an action before a justice for an amount beyond his jurisdiction, and his judgment on it had been reversed on *certiorari*. *Slocum v. Taylor*. viii. 399
23. Awards at common law are to be construed according to the intent of the parties, and so as to quiet all differences. *Buckley v. Ellmaker*. xiii. 71
24. Arbitrators may give damages up to the date of the award, if such is the general intent of the parties apparent in the submission. *Ibid*.
25. If this intent were doubtful, the presumption is, where damages are given up to the date of the award, that none were sustained after the time of the submission. *Ibid*.
26. Arbitrators at common law cannot give costs, unless expressly authorized. *Ibid*.
27. Award of a certain sum to the plaintiff, "which is to be in full of all damages and costs to this date," &c: it appearing by the submission that the costs of a suit pending between the parties were agreed to be paid by the plaintiff, and the recital of the award, stating that the question of damages only was submitted, *held*, to mean that damages only were given, in full discharge of all claims by the plaintiff. *Ibid*.
28. Ambiguous language in awards at common law is to be construed so as to support the award. *Ibid*.
29. An award in account render under the arbitration law is bad, unless it annex to the report an account showing the balance due. *Montgomery v. Burge*. xiii. 112
30. Construction of awards. *Noble v. Peebles*. xiii. 319
31. Prosecutions for assaults and batteries may be the subject of reference by the parties. *Ibid*.
32. A writ of error does not lie on a decision of the court below, setting aside award of referees, on exceptions founded both upon law and fact, though the award was set aside exclusively upon the points of law, without reference to the exceptions founded in fact. *Gratz v. Phillips*. xiv. 144
33. Whether an award shall be sent back to be corrected by the referees, is a matter which rests in the discretion of the court below, and in which this court has no right to control them. *Ibid*.
34. If several trustees, who have separately received money, agree to enter into an amicable reference, as defendants, and stipulate, "that no advantage shall be taken as to the form of suit, or the liability of the parties in it," an award against them jointly is good. *Ibid*.
35. In a *scire facias* against the heirs of A., and the terre-tenants of lands which belonged to him, issued upon a judgment obtained against him in his lifetime, an award of arbitrators, under the act of the 20th of March, 1810, in favour of the plaintiff for a certain sum, "to be levied of the lands of A., deceased, or that descended to the heirs through or by virtue of him, the said A., deceased," is bad, for uncertainty. *Kitchen v. Funston*. xiv. 337
36. In an action against the commis-

sioners of a township, an award of arbitrators, that the defendants shall pay to the plaintiffs a certain sum, "as soon as the defendants should be in possession of the township funds to do so," is uncertain and bad.

Williams v. Landon. xiv. 338

37. An award of arbitrators, under a submission at common law, fixing a boundary line, is conclusive. *Davis et al. v. Havard.* xv. 166

BAIL.

See APPEAL, 10, 13. ARBITRATION, 34. EXECUTION, 15, 24. SUPREME COURT, 1, 2. WRIT OF ERROR, 15.

1. The defendant cannot, by entering a rule of arbitration before entering special bail, deprive the plaintiff of special bail. *Maus v. Sutesinger.* ii. 421
2. But if the plaintiff file his statement, appear by attorney and plead his cause before the referees, he cannot afterwards assign for error that the defendant did not enter bail. Such conduct is an acceptance of appearance without bail. *Ibid.*
3. When by act of assembly, the bail has ten days from the service of the *scire facias* to surrender his principal, he is not deprived of the right of surrendering him during that time by a recognizance entered into before a magistrate to surrender within six months. *Comm. v. Kite.* vi. 399
4. It is not necessary in order to charge the bail in error, to sue out execution against the principal. *Smith v. Ramsay et al.* vi. 573
5. A positive affidavit of a debt made before a justice of a peace, in *England* is sufficient to hold a party to special bail. *Walker et al. v. Bam-ber et al.* viii. 61
6. Special bail has until the *quarto die post* to surrender the principal. *McClurg v. Whiting's special bail.* ix. 24
7. If the principal be in court within the four days ready to be delivered up, and the court on a rule to show cause why he should not be surrendered, hold the matter under advisement, without committing the principal, he may be surrendered when the court makes the rule absolute, although the four days have expired. *Ibid.*
8. *Query.* Whether an order for an *exoneretur* be the subject of writ of error. *Ibid.*
9. If the plaintiff takes out a rule for

arbitration, before special bail is entered, it is a waiver of bail; but the defendant has no right to enter a rule before he has put in bail. If he does, and obtains an award in his favour, the court will set it aside unless the plaintiff consents to the proceeding of the arbitrators. *No-nes v. Gelbaud.* xi. 9

BAIL BOND.

See ARBITRATION, 34. WRIT OF ERROR, 15.

1. The court will set aside proceedings in a bail bond suit, where the same advantage is given to the plaintiff which he would have had if special bail had been entered at the regular time. *Union Bank of New York v. Kraft.* ii. 284
2. It seems that a suit upon a bail bond, commenced after special bail, in the original action, has been entered, cannot be sustained. *Ibid.*
3. Where special bail has been delayed until the plaintiff has lost the opportunity of trying his cause, as soon as he might have done, if the bail had been entered within six weeks after the return of the original writ, the bail bond must stand as a security for the debt to be recovered. *McFarland v. Holmes.* v. 50

BAILMENT.

1. A voluntary bailee, without reward, is responsible for the loss of the goods intrusted to him, only in cases of *gross negligence*. *Tompkins v. Saltmarsh.* xiv. 275
2. In an action against a voluntary bailee, for the loss of goods by carelessness and negligence, he may give in evidence his own acts and declarations, immediately before and after the loss, to repel the charge. *Ibid.*
3. But the defendant cannot himself be examined, to prove that the loss was not occasioned by his own neglect, carelessness, and mismanagement. *Ibid.*

BAIL PIECE.

See INSOLVENT LAW.

BANK.

See CORPORATION, 21. EVIDENCE, 317. PROMISSORY NOTES, 19, 23.

1. In a suit brought by a bank to recover the amount of a note, a receipt signed by A., who was president of the bank but did not sign it as such, for money to be deposited to the credit of B., (a payment by whom was equivalent to a pay-

- ment by the defendant,) is evidence, though not conclusive against the bank; without notice of the receipt having been given to the institution previous to the trial. *Sterling v. The Susquehanna and Marietta Trading Company.* xi. 179
2. Declarations by a person who had been president of the bank, but who was not a party to the suit, respecting payments made on the note, are not evidence against the bank. *Ibid.*
 3. If a note endorsed in blank be put into bank for collection, and be not withdrawn after it is protested, the bank may support an action upon it, in its own name. *Ibid.*
 4. One who is elected to an office in a corporation by the body in which the power to elect is vested, but by a less number of that body than the charter authorizes is an officer *de facto*, and his acts, at least as they respect third persons, are binding on the corporation. *Baird v. Bank of Washington.* xi. 411
 5. Where, therefore, a bank was governed by 13 directors, five of whom were a quorum for the business of ordinary discounts, but a majority of the whole number was required for all business, and the directors, at a meeting when five only were present, elected G. B. to fill a vacancy in the board, and at another meeting when eight were present, including G. B., agreed by a note of six to one (one having retired before the vote was taken) to accept the real estate of a debtor in satisfaction of a debt due to the bank, G. B. voting in favor of the acceptance; it was held that G. B. having come into the direction under the colour of right, was not a usurper, but an officer *de facto*, and consequently that the contract was binding on the bank. *Ibid.*
 6. The circumstance of G. B. being responsible with the debtor, does not invalidate the contract as respects the debtor, unless he has procured the arrangement by collusion with the directors, or some of them: but the liability of G. B. remains unaffected. *Ibid.*
 7. Where by an act of incorporation a bank is empowered to hold "such lands as are *bona fide* mortgaged or conveyed to it in satisfaction of debts previously contracted in the course of its dealing," it has a general power to commute debts *really due* for real estate; and this power does not depend upon, whether, in the opinion of the jury, the debt was in danger; and prudence required that the real estate should be taken in satisfaction of it. *Ibid.*
 8. But it seems, that even if the bank could not hold such real estate, the acquittance of the debt would not be void, and the parties remitted to their original rights; for the bank may take for the benefit of the state, which alone can take advantage of the defect of title. *Ibid.*
 9. It seems too, that if the conveyance were not directly to the bank, but to trustees, with a view not to permanent ownership, but to raise money by a sale of the property, it would be forbidden neither by the letter nor the spirit of the act of incorporation. *Ibid.*
 10. The only ground on which the whole transaction could be declared a nullity, would be such a fraud, practised by the debtor on the directors, as would avoid any other contract between individuals treating for themselves; or collusion with the directors to sacrifice the interests of the bank to those of the debtor. *Ibid.*
 11. A stockholder in a bank, incorporated under the act of assembly of the 21st March, 1813, is not authorized to transfer his stock, while he is indebted to the institution on a note discounted in the ordinary way. *Rogers et al. v. Huntingdon Bank.* xii. 77.
 12. Where a stockholder, who was indebted to a bank on a note discounted, and also for an instalment due upon the capital stock, gave a power of attorney to receive the dividends in his own name, and at the same time another power of attorney to transfer his stock to the plaintiffs, who placed in the attorney's hands money to pay the instalment, and the attorney after depositing the money to his own credit, drew a check in favour of the stockholder, and the money was applied to the payment of the instalment, no notice having been given to the bank of the power to transfer the stock, until some months afterwards, it was held that the plaintiffs were not entitled either to a transfer of the stock or to a return of the money which had been applied to the payment of the instalment. *Ibid.*
 13. The act of 1814, gives no power to the presidents of the banks, thereby created to raise money by drafts upon the bank, nor is any such power

- given to the president *alone*, by a resolution of the directors, authorizing the president *and* cashier to raise money, or obtain discounts for the use of the bank; but if both agree upon a plan of borrowing money, or of obtaining discounts, it is not necessary that both should sign the paper, to carry it into effect. *Ridgway v. The Farmers' Bank of Bucks county.* xii. 256
14. The board of directors have power to authorize the president and cashier to borrow money, or to obtain discounts for the use of the bank. *Ibid.*
15. Independently of any resolution, the sanction of the directors to a draught made on the bank by the president, may be inferred from the evidence given on the trial. *Ibid.*
16. If the president of a bank, who is authorized to borrow money or to obtain discounts for the use of the bank, fraudulently draws a draught in favour of one by whom it is endorsed to the plaintiff, who receives it in the usual course of business, fairly, and without notice of the fraud, his right to recover is not affected by collusion between the drawer and indorser. *Ibid.*
17. Where an act of assembly, incorporating a bank, gives it power to make by-laws, to appoint a cashier and other officers, and makes it the duty of the board of directors to take a bond of the cashier, with two or more sureties for the faithful execution of his duties, and to take such security for the good behaviour of the other officers as the by-laws should prescribe; and by a by-law it is directed that the cashier shall give bond to the bank in a certain sum, with one or more sureties to be approved by the board, and the first book-keeper in a certain other sum; a bond given by two sureties for the good behaviour of the first book-keeper, is binding on the obligors, without that officer's being joined in the instrument, or executing any other bond. *Bank of the Northern Liberties v. Cresson.* xii. 306
18. The sureties in the official bond of a cashier of a bank, created under the act of assembly of 1814, the condition of which bond is, "that he shall well and truly perform the duties of cashier, to the best of his abilities," not only undertake for the fidelity and honesty of the principal, but also that he shall perform the office with competent skill and ability; and if he transcends the known powers of a cashier, by changing the securities of the bank without its knowledge, and loss has accrued by the abuse of his trust, the sureties are answerable for the loss. *Barrington v. The Bank of Washington.* xiv. 405
19. But, in such a case, the measure of damages is, not the amount of the debt lost, but the amount which might have been recovered, if the securities had remained unchanged; and this should be submitted to the jury upon the evidence. *Ibid.*
20. If no evidence be given of a written appointment of a cashier, evidence is admissible to show, that the person alleged to be cashier, acted as such in the various duties of that office; and though a resolution of the Board of Directors, directing the cashier to require certain monies to be paid to him, at the banking house, on or before a certain day, is not evidence *per se*, yet, connected with other testimony, it is evidence of his appointment. *Ibid.*
21. *Query*, whether, if a bank has forfeited its charter, and is unable from the funds paid in to satisfy its debts, an *original subscriber*, who has transferred his stock, is a competent witness for the bank, to increase its funds? An *assignee* of bank stock is no further liable than as a stockholder. *Ibid.*
22. The entry in the book of minutes of a resolution of a certain number of directors, but not a competent number to make a board, that the name of one of the obligors in the cashier's official bond be struck out, provided the others agree thereto, is not evidence to show the consent of the other obligors to the alteration of the bond; but it is evidence to show that the bank was then in possession of the bond unaltered, and that the other obligors had not then consented to the alteration. *Ibid.*
23. A bank winding up its concerns, and selling out its banking house, may receive in part payment therefor the assignment of a judgment against a third person. *Harwood v. Ramsay.* xv. 31
24. Under the act of the 21st of March, 1814, regulating banks, (section 7, article 11,) the bank was justifiable in refusing to permit a stockholder to transfer his stock, who was the drawer of a note discounted at the

bank, but not payable when the transfer was requested, he and the indorser having then become insolvent.

The meaning of the word, "*indebted*," in the 11th article. *Grant v. Mechanics' Bank*. xv. 140

BANK BOOK.

See EVIDENCE, 165. RECORD, 2.

BANK NOTE.

See PROMISSORY NOTE, 5, 6, 19, 23. PUNISHMENT, 1.

BANK OF NORTH AMERICA.

The act of 17th of *March*, 1787, enabled the Bank of North America to have, hold, receive, purchase, possess, enjoy and retain lands, rents, &c.; and also to sell, grant, &c., the same lands, &c. provided that such lands and tenements should only extend to such lots of ground and convenient buildings, &c., as they might find convenient for carrying on the business of the bank, &c. and should actually occupy; and to such lands, &c. as might be *bona fide* mortgaged to them. *Held*, that the bank might purchase absolutely lands in a distant country, which they did not occupy, though their title, like that of an alien is defeasible by the commonwealth; and if they convey to a third person without claim by the commonwealth, such third person holds the estate defeasible in like manner. *Leazure v. Hillegas*. vii. 313

BANKRUPT.

1. Where the surety in a custom-house bond, has paid the debt to the *United States*, and the principal is afterwards discharged by the bankrupt law of 4th *April*, 1800, the surety is merely entitled to *preference* out of the *estate* of the bankrupt, and cannot resort to an *action* against him for the recovery of the money. *Reed v. Emory*. i. 339
2. If a debtor on the eve of bankruptcy, promise to pay the debt when he shall be able, his certificate of discharge under the act of 4th *April*, 1800, is no bar to a suit brought upon the new promise. *Kingston v. Wharton*. ii. 208
3. *It seems* that if the creditor proves the original debt under the commission, and receives a dividend, he may recover the *balance* in a suit brought after the bankruptcy founded upon such a promise. *Ibid*.
4. The act of 13th *March*, 1812, was

constitutional. *Farmers and Mechanics' Bank v. Smith*. iii. 63

5. The states have power to pass bankrupt laws, as long as congress does not legislate on the subject. *Ibid*.

6. A state bankrupt law, is not a law impairing the obligation of contracts within the meaning of the constitutions of the *United States* and *Pennsylvania*. *Ibid*.

BANKRUPTCY.

See ASSIGNEES, 2.

BAR-KEEPER.

The wages of a bar-keeper in a tavern, are to be considered as servant's wages, and are entitled to a preference, as such, under the intestate act of 4th *April* 19th, 1794. *Boniface v. Scott*. iii. 351

BARON AND FEME.

See HUSBAND AND WIFE, PASSIM.

BASTARD.

See MAINTENANCE, 1. QUARTER SESSIONS, 1. SLANDER, 9, 15.

The court ordered a bastard child, between two and three years old, to be restored to the custody of its mother; from whom it had been forcibly, and with some degree of artifice, taken by its grandfather. *Commonwealth v. Fee*. vi. 255

BILL OF EXCEPTIONS.

See COURT, 23. DEPOSITION, 9. ERROR, 59, 60. EVIDENCE, 124. EXCEPTIONS, BILL OF, 1, 2. WRIT OF ERROR, 2, 3, 5, 6, 7.

1. A motion for a new trial is not a waiver of a bill of exceptions. *Shaffer v. Landis*. i. 449
2. Questions proposed by counsel to the court should be confined to matters of law; and if facts are introduced, it should be hypothetically, leaving it to the jury to decide them. *Sweitzer v. Hummel*. iii. 228
3. The court are not bound to answer questions, unless they are pertinent to the issue, and fairly arising out of the evidence. *Covert v. Irwin*. *Id*. 283
4. If a judge, in answer to a question of law, pertinent to the issue, states "that so far as they apply, they are law, but the great matter is their application," the answer is too vague, and is not giving such instruction to the jury, as the party had a right to require. *Fisher v. Larick*. *Id*. 319
5. Error in stating to the jury an abstract principle, not arising out of the evidence, and no way relating to

- the cause, shall not be taken advantage of; but where an erroneous principle had a direct operation on the evidence and withdrew the attention of the jury from other points, it was *held* to be fatal. *Deal v. McCormick*. *Id.* 343
6. It is not fair to select a few sentences from the charge of the court: the whole must be taken together. *Carothers v. Lessee of Dunning*. *Id.* 373
7. It is not error for the judge to state the evidence truly, declining to give an opinion on points on which no opinion is requested. *Ibid.*
8. With inaccuracies of a judge in summing up evidence, this court has nothing to do. *Henwood v. Cheeseman*. *Id.* 500
9. The judge, in charging the jury, is not bound to deliver his opinion on matters of law, further than is required of him. *Fisher v. Larick*. *vii.* 99
10. A bill of exceptions and writ of error lie on the refusal of the Court of Common Pleas to allow the plaintiff an amendment on the trial of the cause which was matter of right under the act of the 21st of March, 1806, whereby the verdict passed against him. *Clymer v. Thomas*. *Id.* 178
11. No exception lies to the permission or refusal of the court below of an amendment at common law or by some statutes: these are within their discretion. *Ibid.*
12. If the drawer or previous indorser of a promissory note is offered as a witness in a suit against a subsequent indorser, and is objected to by the plaintiff, and rejected by the court, and afterwards the plaintiff withdraws his objections, and the defendant refuses to examine them, it is not error. *Liggit v. Bank of Pennsylvania*. *Id.* 218
13. The silence of the court concerning the testimony of a witness is not a withdrawal of it from the jury. *Morris v. Travis*. *Id.* 220
14. Exceptions to evidence must be taken as soon as the court has decided to admit or reject the evidence. It is sufficient, however, if a note be taken of the exception, and submitted to the court at the time. It may be reduced to form afterwards. When an exception is taken to the charge of the court, the substance of the exception should be reduced to writing, and tendered to the court before a verdict is delivered by the jury in open court. It may afterwards be put into form. *Morris v. Buckley et al.* *viii.* 211
15. The regular mode of procuring a return of a bill of exceptions by a judge whose office has expired, is by *certiorari* to him. But the court in its discretion may impose terms on a party applying for the writ. *Galbraith v. Green*. *xiii.* 85

BILL OF EXCHANGE.

See ALTERATION, 1, 2. BANK, 11, 12. EVIDENCE, 317. PROMISSORY NOTE, PASSIM. WITNESS, 29, 44, 59, 67.

1. The drawer of a bill of exchange may rebut the presumption of his liability in case of non-payment by the drawee, by proving that between the payee and himself there was no consideration, or that is was the general understanding that he was merely an agent, and not to be held responsible; but he is not bound to show a special agreement to exonerate him. *Miles v. O'Hara*. *i.* 32
2. In an action by the indorsee against the indorser of a foreign bill of exchange, which had been protested for non-acceptance, it is not necessary to prove notice of the non-acceptance of the bill. *Read, Administrator, v. Adams*. *vi.* 356
3. A., having accepted two bills for nearly the same amount, on the same day, sent his clerk to the person in whose hands they were, as agent of two different holders, to take up one of them, but the clerk took up the other and brought it to A. who struck out his name as acceptor. In about five minutes after he received it, he wrote his name again under the acceptance, and sent it back to the agent, who received it and gave up the other bill. *Held*, that the bill first taken up was paid, and the indorsers discharged. *Bogart et al. v. Nevins et al.* *Id.* 361
4. Where an assignment was made for the payment of accommodation notes subscribed or indorsed for the assignors, so as to exonerate the makers or indorsers from their liability, *held*, 1. That a bill drawn on the assignors for their accommodation in favour of and indorsed by the drawer, and accepted and negotiated by the assignors, is embraced within this description. 2. That the balance of accounts between the assignors and the draw-

ers, or indorsers of such paper, is to be taken into consideration, and the remainder, after deducting such balance, to be paid to the holders. *Da Costa v. Guieu.* vii. 462

5. A note discounted in the *Swatara* bank is not to be considered as a specialty in the distribution of assets. *Wolfersberger v. Bucher.* x. 10
6. Where the plaintiff was drawer, and the defendant indorser with others, of a promissory note, which the plaintiff paid, the declarations of other indorsers, that the parties had agreed to be mutually responsible for the note, are not evidence against the defendant. *Slaymaker v. Gundacker's Executors.* Id. 75
7. Nor is the evidence of one of the indorsers, that the parties were bound in honour to each other, or proving a conversation between him and another indorser, admissible. *Ibid.*
8. If the directors of a turnpike company become the drawers and indorsers of a note on which money is borrowed for the use of the company, and applied to the payment of its debts, they are, in the absence of any special agreement, mutually responsible and liable to contribution, in case of loss, whether payment be made by one by compulsion or voluntarily. *Ibid.*
9. If in the place of such a note on which the defendant was indorser, a new note be drawn not indorsed by the defendant, which is applied at bank to the discharge of the first, it is a payment of it; but whether it barred the remedy against the defendant for contribution, is for the jury to decide under all the circumstances. *Ibid.*
10. A note promising to pay A. B. or order five hundred dollars, in notes of the chartered banks of *Pennsylvania*, is not a negotiable note, on which the indorsee can sue in his own name. *M'Cormick v. Trotter.* Id. 94
11. In an action by the indorsee against the maker of a note, the handwriting of the indorser must be proved. *Ibid.*
12. Where it had been testified by some witnesses that certain bonds which had been legally assigned to a bank with warrant to enter judgment, given at the request of the bank, and of which it retained possession, were assigned as a collateral security, not only for the bank, but

for the indorsers of a note discounted by the bank, *held*, that it was error to charge the jury, that if they believed the fact to be so, the negligence in not entering up the judgments on the bonds, and issuing executions, was as much the fault of the indorsers as of the bank. *Lyon et al. v. Huntingdon Bank.* xii. 61

13. If the holder of a note, who, at the time it was discounted, knew that it was drawn for the accommodation of the indorser, give time to the indorser without consulting the drawer, the latter is not thereby discharged. *Walker v. Montgomery County Bank.* Id. 382

BILL OF LADING.

- A. of *Liverpool* shipped goods, which by the bill of lading, were to be delivered to B., or his assigns in *Philadelphia*. The goods belonged to A., and the freight was payable in *Liverpool*. *Held*, that the bill of lading vested the property in the consignee, who might maintain an action in his own name against the ship owner for the negligent carriage of the goods. *Griffith v. Ingledew.* vi. 429

BLANK.

See ALTERATION, 2.

BLASPHEMY.

1. Christianity is part of the common law of *Pennsylvania*; and maliciously to vilify the Christian religion is an indictable offence. *Updegraph v. The Commonwealth.* xi. 394
2. The act of 1700, against blasphemy, is neither obsolete nor virtually repealed. *Ibid.*
3. But in a prosecution under that act, if the indictment do not lay the words to have been spoken *profanely*, it is bad. *Ibid.*
4. *It seems* that in such an indictment it is not sufficient to lay the substance of the words alleged to have been spoken. The words themselves must be laid, though only the substance need be proved. *Ibid.*

BLOCKADE.

See INSURANCE, 3, 9, 10, 11, 12, 13, 14, 15, 16.

BOARD OF PROPERTY.

See EVIDENCE, 12, 68, 69, 136, 138. RECORDS, 1. SURVEY, 3, 4. WARRANT AND SURVEY, 17, 27, 28, 30.

1. The opinion of the Board of Property is entitled to consideration, as evidence of the custom and practice of the land office, and as the opinion of persons deciding on matters submitted to them by law; but it is not conclusive. *White v. Kyle's Lessee*. i. 515
2. The Board of Property has no authority to vacate a patent, and their minutes of *ex parte* proceedings for such purpose are not evidence of any thing. *Foster v. Shaw*. vii. 156
3. The Board of Property are public agents with limited authority, and if they exceed the powers given them by the acts of assembly, in granting an island, their acts are void. *Hunter v. Howard*. x. 243
5. No advantage can be taken by the executors of one obligor of being sued alone on a joint obligation without pleading in abatement; unless it appear on the record that the other obligor is alive or survived the defendant's testator. *Ibid.*
6. Every bond imports in itself a sufficient consideration though none be mentioned. *Grubb v. Wiltis*. xi. 107
7. Where judgment is confessed for the penalty of a bond, execution may issue for the condition, with interest, without a writ of inquiry. *Ibid.*
8. If a bond be taken for more than the real debt, with an intent to defraud the creditors of the obligor, the whole bond is void as to creditors. *Whiting v. Johnson*. Id. 328
9. A bond executed by two obligors binding themselves their heirs, executors, administrators, and every of them, is joint and several, and may be enforced against the representatives of a deceased obligor, although he was only a surety. *Bessore et al., Executors, v. Potter, Executor*. xii. 154

BOND.

See ACTION, 19, 21. ADMINISTRATION BOND, 1. ALTERATION, 1. ARBITRATION AND AWARD, 1. ASSIGNMENT, 2. ASSIGNMENT OF BREACHES, 1. BANKS, 17. DECLARATION, 6. ERROR, 111. EVIDENCE, 18, 19, 25, 30, 150. JEOPAILS, 1. JUDGMENT, PASSIM. OBLIGATION, 1, 2, 3. PAROL EVIDENCE, 13, 14. PAYMENT, 2, 3, 6. PLEADING, 32, 33, 37, 58. RASURE, 1, 2. SHERIFF'S RECOGNIZANCE, PASSIM. SHERIFFS' SALE, 17.

1. A. and B. executed a joint bond payable on demand to C. and D., in which B. was security merely, and received no part of the money. B. died after more than four years had elapsed from the date of the bond. After his death A. paid part of the debt and afterwards became insolvent. *Held*, that no suit could be maintained against the executor of B. for the recovery of the balance due. *Weaver et al. v. Shyrook, Executor of Brotherton*. vi. 262
2. Payments by the obligor to the obligee without notice of any assignment of the bond are good. *Brindle v. McIlvaine*. ix. 74
3. A declaration stating a bond executed by four, payable when three of the obligors should be required, is good. *Carl v. The Commonwealth*. Id. 63
4. An obligation by two, binding themselves and each of their heirs, executors and administrators is joint and several. *Geddis v. Hawk*. x. 33
10. M., being the holder of a bond against W., assigned it equitably to B., who gave notice of the assignment to W., the obligor, who acknowledged that it was a just bond, and promised to pay it, deducting certain credits to which he was entitled. It was agreed, that these credits should be adjusted between B., and W., and W., was warned to pay no other person than B. At the time of the assignment, B. gave to M. a writing, stating that there appeared to be due to M., on the bond, two hundred and fifty-seven dollars, deducting one hundred and seventy-three dollars and fifty cents on W's. account, B's account being also deducted. This writing M. assigned to C. and ordered two hundred and fifty-seven dollars of the principal of the bond to be paid to C. It turned out that there was an error in the calculation, on which the writing given by B. to W. was founded, W. having paid to M. before the assignment to B., seventy dollars more than the writing stated. W. paid to C. the full sum of two hundred and fifty-seven dollars, (seventy dollars more than M., had a right to assign to him;) and, in an action on the bond, brought by M., for the use of B., it was *held*, that W. was responsible to B. for this sum of seventy

dollars paid to C. *Weaver v. M^cCorle*.
xiv. 304

BOND AND WARRANT.

See ERROR, 44. MORTGAGE, 5.

BOOKS.

See EVIDENCE, 155.

BOOKS AND WRITINGS.

See EVIDENCE, 20. SET-OFF, 6, 13, 21.

1. An order of the court to produce books or writings, ought to be made on the plaintiff on record, and is bad if directed to a third person, though he is the plaintiff's agent. *Rose v. King*. v. 241.
2. Such an order ought not to be made during a trial, but previous thereto, and the party should have the same time that he would have to prepare for trial. *Ibid*.
3. The affidavit on which such order is grounded should contain a direct averment of the facts necessary to authorize the order, that the writing is pertinent to the issue, and was in the power or possession of the plaintiff at the time of the notice. *Ibid*.
4. An affidavit that the writing is "respecting" the land in dispute, is bad. *Ibid*.
5. The notice should describe the paper with reasonable certainty. *Ibid*.
6. It is not necessary, to enable the court to make an order for the production of books or papers, that the previous affidavit or proof of the party applying for the order should be positive: it is sufficient if there be laid before the court probable ground for belief, and the party called on must then produce the documents or satisfy the court.
7. If the defendant fails to produce the books or papers on the trial or satisfy the court, in pursuance of its order, the court may discharge the jury and enter judgment by default. *Wright v. Crane*. xiii. 447

BREAD ACT.

A discharge by a court of competent jurisdiction of a poor insolvent debtor under the bread act, cannot be impeached in a collateral way, by proof that at the time of his discharge he was in possession of a sufficient sum of money to pay the debt for which he was confined. *M^cKinney v. Crawford*. viii. 357

BRICKS FURNISHED.

See LIEN, 3, 7.

BRIDGES.

See TAXES, 12.

The materials furnished by *Franklin* county for a bridge over the *Conococheague* creek, became, when that bridge was pulled down and a new one erected in its place by the *Chambersburg and Bedford Turnpike road Company*, the property of the company, which the Turnpike road Company, had no right to convert to their own use. *Chambersburg and Bedford Turnpike road Company v. Commissioners of Franklin county*. vi. 229

BURGLARY.

1. In an indictment for burglary, the word "*mansion house*," is a good description of the premises. *Commonwealth v. Pennock*. iii. 199
2. It is not error that the court in their sentence for burglary have included the forfeiture of property imposed by law. *Ibid*.

BY-LAW.

See CORPORATION, 4, 5, 11.

CALLOWHILL STREET.

Callowhill Street, in the city of *Philadelphia* having been laid down in the plan returned by virtue of the act of the 17th of *April*, 1795, cannot be widened by virtue of the act of the 22d of *March*, 1818. *Commissioners of Philadelphia county v. Commissioners of Spring Garden*. v. 522

CAPIAS AD SATISFACIENDUM.

See SURETY, 1.

A *capias ad satisfaciendum* was issued when the defendant had sufficient real estate to satisfy the debt, and he was arrested and imprisoned. *Held*, that trespass lies against the party who sued out the *ca. sa.*, but that it is a justification to the officer executing it. *Allison v. Rheam*. iii. 139

CARRIER.

See SALE, 2. USAGE, 1, 2.

CASE, ACTION ON THE.

See ACTION, 13.

Case lies for debauching a man's daughter and getting her with child, by which he lost her service, &c., and is the most proper form of action. *Ream v. Rank*. iii. 215

CASHIER.

See BANKS, 18, 19, 20.

CAVEAT.

See IMPROVEMENT, 8.

CAVEAT EMPTOR.

See MONEY HAD AND RECEIVED, 1, 2, 3. SHERIFF'S SALE, 10, 11.

CERTIFICATE.

See ACKNOWLEDGMENT, 2, 3, 4.
COSTS, 11. CONNECTICUT TITLE,
3, 4, 5, 8, 10, 11. EVIDENCE,
75.

CERTIORARI.

See ACT OF ASSEMBLY, 7. COURT,
8. SWINE, 1.

1. On a *certiorari* upon a suggestion of diminution directed to the president of the court below, by consent, he stated certain facts, and then, "submitted to the judges of this court whether certain matters ought to be returned and certified as part of the record." This court declined deciding, and returned it to the court below to determine whether the record contained the whole matter. *Bassler v. Niesly*. i. 472
2. A *certiorari* lies from the Supreme Court to remove the proceedings of two of the aldermen of the city of *Philadelphia*, under the act of the 6th of *April*, 1802. *Lenox v. M'Call*. iii. 95
3. The 22d section of the act of the 20th of *March*, 1810, which declares that the judgment of the Court of Common Pleas shall be final on all proceedings removed by *certiorari* from before justices of the peace, and that no writ of error shall issue thereon, is confined to *certioraris* issued under it, and does not extend to a case removed prior to that act. *Love v. Barton*. iv. 269
4. In a suit on a recognizance entered into by the defendant, on removing a suit by a *certiorari*, which was heard and determined, it is no defence that the *certiorari* was not allowed. *Patton v. Miller*. xiii. 254

CHALLENGE.

- See INDICTMENT, 18, 19. JUROR, 3,
4. JURY, 4, 5, 6, 7, 8, 14.
1. After a party has waived his right to challenge jurors, he cannot resume it. *Wenrick, Esq. Sheriff v. Hall*. xi. 153
 2. It is no cause of challenge to a juror, that he has been examined as a witness on the trial of the same cause before arbitrators, on a point material to the issue. *Harper et al. v. Kean*. xi. 280

CHALLENGE TO THE ARRAY.

See JURY, 14.

CHARGE.

See ACTION, 7, 8, 10. ESTATE TAIL, 2.

CHARTER.

See CORPORATION. PASSIM.

CHECK.

See BILL OF EXCHANGE. PASSIM.

1. A naked check payable to one or bearer, is not evidence, *per se*, of payment to the person whose name is inserted. It is necessary, in order to establish such payment, to prove that the payee received the money at the bank; and in order to charge him as debtor, some evidence should be given to show that the check was not given in payment of a debt due by the drawer. *Patton's Administrator v. Ash*. vii. 116
2. Finding a check cancelled among the drawer's papers, is not evidence of such payment. *Ibid*.

CHILDREN.

Where the mother of two female children had been divorced from her husband, on account of her adultery, the court, on a *habeas corpus*, decreed them to the father; the children no longer requiring those attentions which a mother alone can properly bestow, and having arrived at an age when their morals were likely to be injured by bad example. *Commonwealth v. Addicks*. ii. 174

CHRISTIANITY.

See BLASPHEMY, 1, 2, 3, 4.

CHURCH.

See QUO WARRANTO, 3.

CLAIM.

See ENTRY, 3, 4.

COLLATERAL WARRANTY.

In *Pennsylvania*, a collateral warranty descends on the eldest son. *Jourdan v. Jourdan*. ix. 268

COLLECTOR OF TAXES.

See QUO WARRANTO, 2.

1. The "two reputable citizens," directed by the 10th section of the act of the 11th *April*, 1799, to be returned by the assessor of each ward or township, to the county commissioners, in order that they may choose one of them collector of taxes, must be resident *within* the ward or township for which they are returned, and possess a freehold therein. *Commonwealth v. Commissioners of Philadelphia County*. i. 382
2. If the assessor return two persons, one of whom is qualified and the other is not, the commissioners are not bound to appoint either. *Ibid*.

3. If the assessor return persons who are not legally qualified, the commissioners may appoint another person; but the person so appointed must possess the same qualifications which are required by the act for those to be returned by the assessor.

Ibid.

4. A collector who is in arrear for the collections of former years, and has not given security for the payment of those arrears, is for that reason alone, disqualified for the office.

Ibid.

COMMENCEMENT OF SUIT.

See RECORD, 2.

COMMISSION.

See WITNESS, 2.

COMMISSIONERS.

See CONNECTICUT TITLE, 1, 2, 4, 10,
11. CORPORATION, 23. EVIDENCE,
34. TOWNSHIP, 1, 2.

COMMISSIONERS' DEED,

See EVIDENCE, 116.

COMMISSIONS.

See GUARDIAN AND WARD, 3, 4.

COMMISSION TO TAKE DEPOSITIONS.

1. It is a sufficient execution of a commission to take depositions, if the commissioners annex their names to the depositions, and the envelop is sealed.
2. It is sufficient if the name of the county appear in the margin of the deposition, to be one of those to which the commission was directed, if it be an *ex parte* commission.
3. Where a commission is directed to several commissioners residing in different counties, or either of them, one may take depositions in one of the counties named, though he do not reside there. *Nussear v. Arnold*. xiii. 323

COMMON OF PASTURE.

See WESTERN UNIVERSITY, 1.

COMMON RECOVERY.

1. *Query*, Whether a common recovery suffered by the tenant for life, destroys a contingent remainder in *Pennsylvania*. *Dunwoodie v. Reed*. iii. 435
2. *J. H.*, the elder, being seized in fee, devised lands to his nephew *W. H.* for life, without impeachment of waste, and after his decease to the

first son of his body, for and during his natural life, without impeachment of waste, and after his decease to the heir male of his body lawfully begotten, that is to say the first, second, third, fourth, and every other son and sons successively of said first son, as they shall be in seniority of age and priority of birth, and to the heirs male of the body lawfully of such first, &c. son and sons respectively; and, in default of such issue, to the second son of said *W. H.*, for and during his natural life, &c.; and after his decease to the heirs male of the body of such second son lawfully begotten, that is to say, &c., (as before with the first;) and in default of such issue, to the third, fourth, fifth, and every other son and sons successively, of the body of the said *W. H.*, one after another, according as they shall be in seniority of age and priority of birth, for their natural lives, &c., and after their deaths, &c., (as before, with the first and second.) And for default of such issue, to his nephew *A. H.*, for life, and without impeachment of waste; and after his decease, to the first son of his body, &c., exactly as it had been to the issue of *W. H.*; and for default of all such issue male, as aforesaid, to the heirs of the body of the said *W. H.*; and for default of such heirs, then to the heirs of the body of the said *A. H.*; and after other remainders, over remainder to the right heirs of the testator. The will was dated 4th of *March*, 1776, and the testator died in the year 1783; at which time his nephews, *W. H.* and *A. H.*, were both living; and also the said *A. H.*'s first son *J.*, and second son *A. H.* died before his brother *W. H.*, leaving issue two sons, *J.* and *A.*, and four daughters. *W. H.* died without issue. After his death, *J.*, son of *A. H.*, conveyed the land by deed of bargain and sale, to *T. P.*, in fee. To this deed *A.* was party, and it was declared to be to make *T. P.* tenant to the *præcipe* in a common recovery, which was to be suffered for the purpose of vesting the *fee simple* in *J. H.* It was accordingly suffered in the Supreme Court, at *March* term, 1803, with treble voucher, the said *T. P.*, *J.*, and *A.*, being severally vouched. *Held*, that *J.* was seized of an estate for life in possession, with contingent remainder to his sons successively in tail male; and that *A.* had

an estate for life, vested in interest, with contingent remainders to his sons successively, in tail male; after which a remainder, in tail general, was vested in *J.*, with remainder, in fee simple, vested in *J.* and *A.*, and their sisters; that the recovery was well suffered, and that by it *J.* became seised of an estate in fee simple, in possession. *Lyle v. Richards*. ix. 322

COMMON SEAL.

See EVIDENCE, 116.

COMMONWEALTH.

See FEES, 4, 5, 9. PURCHASE MONEY, 3. TITLE, 1.

COMPENSATION.

See CONNECTICUT TITLE, 5, 6, 7, 8, 11.

CONDITION.

1. A. conveyed land to B. by deed, and the parties executed an indenture reciting the deed, and that it was their intent and meaning, and the deed of conveyance was on this condition, and mutual agreement between the parties, that B. should indemnify A. from all costs and charges by reason of the non-payment of the quit rent due or to become due, and would also build a dwelling-house on the lot, and suffer A. and his wife to reside there during their joint lives, and until it should be built, they were to reside in the old tenement then on the lot. After this followed covenants for mutual performance; B. paid the quit rents but did not build the dwelling-house. A. and his wife resided in the tenement during their lives, and A. some time before his death conveyed the estate to another. *Held*, that the estate was upon condition of building, which B. forfeited by not performing within a convenient time, whereby the estate vested in B. without the necessity of re-entry to take advantage of the condition, as he was in possession, and without notice of the non-performance of the condition. *Hamilton v. Elliott*. v. 375
2. Testator devised a mill and tract of land to his son, and directed that should he sell the mill or any part of the land within ten years from his decease, one half of the purchase money should be equally divided amongst the rest of his heirs, and should remain a lien on the premises. About four months previous to the expiration of the ten years, the son contracted to sell, and received a small payment on account, but in three months after the parties annulled this contract, and made a new agreement for the property to be completed when the son could safely convey it, which was completed after the ten years had expired: *Held*, that the sale was valid, and the condition not broken. *Steedman v. Cooke*. xiii. 172

3. If a person to whom land is devised on condition of releasing a debt due by testator, receives the debt, the title to the land is thereby relinquished, and the receipt of the money from a third person, vests no title to the land in such person. Yet if such person take possession and is suffered by the family to hold it, and the money was the full value, and the payment was known and acquiesced in by the heir, and improvements were made, especially if it was land held under warrant and survey, and before 1780, when this was considered personal property, chancery would direct a conveyance. *Frederick v. Gray*. x. 182

CONDITION PRECEDENT.

See ORPHANS' COURT, 14.

CONFIRMATION.

To make a confirmation of a contract in which a man has been defrauded, very strong facts must be shown, particularly that he had full knowledge of the truth. *Juniata Bank v. Brown*. v. 226

CONNECTICUT CLAIM.

1. The lines established on the ground by the surveyor of the commissioners, under the act of the 4th of April, 1799, within the seventeen townships, if not subsequently altered by the acts of the parties, ought to prevail. *Perkins v. Gay*. iii. 327
2. In an ejectment for lands in Luzerne, it is immaterial, whether or not the defendant claimed title under the *Susquehanna Company*, if the ejectment were not brought till after more than two years from the passage of the act of the 25th of March, 1813. *Overfield v. Christie*. vii. 173

CONNECTICUT TITLE.

See FEIGNED ISSUE.

1. Where a commissioner under the act of the 4th of *April*, 1799, was appointed president of the Court of Common Pleas, his subsequent acts as commissioner were held good. *Shepherd et al. v. Commonwealth.* i. 1.
2. Having held a *Connecticut* title and sold it with special warranty, does not create such an interest as disqualifies a person from acting as commissioner. *Ibid.*
3. It is not necessary that surveys and certificates under the act of the 4th of *April*, 1799, should be for any particular quantity of land, if the same patenting fees are paid, as if the lands were divided into tracts of the usual size. Islands may be included in such surveys and certificates. *Ibid.*
4. The certificate of the commissioners, is conclusive upon the commonwealth, as to the assignment of the property and settlement prior to the decree of *Trenton*. Under the act of the 28th of *March*, 1814, the court may order a new survey. *Ibid.*
5. *Pennsylvania* claimants whose titles accrued prior to the 28th of *March*, 1787, but who did not release under the compensation act, and were thus debarred of compensation, were not deprived of their title to the land, though it was certified agreeably to law to *Connecticut* claimants. The legislature cannot take away the property of an individual without compensation. *Lessee of Pickering v. Rutty.* i. 511
6. In a suit by a *Pennsylvania* claimant for compensation under the act of the 3d of *March*, 1812, the value of the land is to be estimated, as it is at the time of making the compensation: unless there be laches in bringing the suit. *Evans v. The Commonwealth.* ii. 441
7. It is error if the court in such suit reject evidence of the value of the land on the 1st of *March*, 1812. *Ibid.*
8. After a certificate granted to a *Connecticut* claimant, the title of a *Pennsylvania* claimant, who has not received compensation, is assignable by deed; and such assignee may recover under the act of the 3d of *March*, 1812. *Ibid.*
9. A declaration averring that the plaintiff was seised on the 3d of *March*, 1812, and still hath a right of action, &c., is sufficient, though the proof be that he was not seised till the 18th of *December*, 1812. *Ibid.*
10. Between *Connecticut* claimants of lands within the seventeen townships of *Luzerne*, under the act of the 4th of *April*, 1799, and its supplements, the certificate of the commissioners is conclusive evidence of title. *Dailey v. Avery.* iv. 281
11. Between *Connecticut* claimants under the act granting compensation for lands within the seventeen townships, the certificate of the commissioners is conclusive, and a party cannot in order to raise a trust, give evidence to show, that the commissioners were imposed upon, and that the certificate ought to have been granted to him. *Strickland v. Strickland et al.* vi. 94
12. It is not an infraction of the law for a person holding the *Pennsylvania* title to agree with a settler under a *Connecticut* title for the surrender of his possession, on paying him a compensation for his improvements, buildings, and crop in the ground; and when the fact, whether the contract was for the purchase of the possession and improvements or of the title to the land, depends as well upon other evidence as upon writings, it is proper to submit the question to the decision of the jury. *Overton v. Tracey.* xiv. 311

CONSIDERATION.

See ASSUMPSIT, 9, 11, 20, 27.

DEED. PAYMENT. SETTLEMENT.

TAVERN RECKONING.

1. Where the parties have by special agreement, limited the inquiry into the consideration of a note, the defendant will not, on the trial, be admitted to take a wider ground. *Duncan v. Findlay.* vi. 235
2. A. and B. having given to C. their promissory notes, drawn in *Virginia*, and which were put in suit in that state, entered into an agreement with him that the suits should be dismissed at the cost of the defendants, in consideration that the said A. and B. and one D. gave to C. their joint and several note, equal in amount to the three notes above mentioned, dated the same day with the agreement, and payable in one year. It was also agreed

that A. and B. should be permitted within twelve months of the date of the new note, but not after, to show by judicial proceedings, or by legal evidence, satisfactory to C. that the said three notes were given without legal or equitable consideration, or to establish any off-sets: but if the proceedings to establish any want of consideration, or payment in part or in whole of the said three notes were not commenced within twelve months, then the new note to be paid without delay. *Held*, that in a suit brought against B. on the new note, evidence of the consideration of the three original notes, which had been filed of record in the court in which suits were brought on them in *Virginia*, and that the defendant had, in the presence of the plaintiff, applied for them at the office of the clerk of the said court, who refused to deliver them in consequence of their being part of the record, was inadmissible, although at the time of the execution of the said three notes, and ever since, both the plaintiff and defendant resided in *Pennsylvania*. *Ibid*.

3. Seduction of a female, and begetting upon her a bastard child, is a sufficient consideration for a promise by the party to give his bonds to the woman for a sum of money, if there be nothing unfair or oppressive in the transaction. But, if the promise was solely in consideration of stopping a criminal prosecution, for fornication and bastardy commenced or threatened, it would be void. *Shenk v. Mingle*.

xiii. 29

CONSIGNEE.

See BILL OF LADING, 1.

CONSIGNMENT.

See LIEN, 8.

CONSOLIDATION.

See ARBITRATION, 15.

A consolidation of suits is never directed by the court without the consent of the defendant. *Groff v. Musser*.

iii. 262

CONSPIRACY.

See CRIMES AND MISDEMEANORS, 1, 2. INDICTMENT, 12, 13, 14, 18, 19, 38. SLANDER, 14.

1. An overt act charged to be done by one conspirator in pursuance of

the conspiracy, is to be considered as the act of all. *Collins v. Commonwealth*. iii. 220

2. A conspiracy to defraud by means of false pretences and false writings in the form and similitude of bank notes, and in pursuance thereof uttering as a genuine bank note one of such writings, knowing that no such bank existed, and that the note was of no value, is punishable by hard labour under the act of the 5th of *April*, 1790, and the 4th of *April*, 1807. *Ibid*.

CONSTABLE.

See COURT MARTIAL, 2, 3. EVIDENCE, 30. INDICTMENT, 12, 13, 14. JUSTICE, 23. KEEPER OF PRISON, 1. LIMITATIONS, ACT OF, 19.

1. One who has been aggrieved by the official misconduct of a constable, may either bring suit in the Court of Common Pleas against the constable and his surety on the official bond, or may proceed against the constable alone, in the first instance, before a justice of the peace, and afterwards against the surety in the manner prescribed by the 19th section of the act of the 20th of *March*, 1810. *Palmer et al. v. The Commonwealth*. vi. 245
2. The surety of a constable is liable for his breach of duty in not paying over money collected on a warrant placed in his hands, commanding him to levy on a constable of an adjoining township under the 12th section of the act of the 20th of *March*, 1810. *Clerk v. Worley*. vii. 349
3. An action of debt may be maintained in the Court of Common Pleas on the official bond of a constable in the name of the commonwealth, for the use of the party aggrieved, in which the judgment must be for the damages sustained by the party suing. Suits on the bond are to be brought as often as damages are sustained. The jurisdiction of the Courts of Common Pleas, and that of justices of the peace under the 19th section of the act of the 20th of *March*, 1810, are concurrent. *Campbell et al. v. Frick, Administrator of Hurley*. viii. 414
4. If an execution is sued by a magistrate, having a right to issue it,

be served by a constable, whose authority does not extend to the district in which the defendant resides, no suit can be maintained against the constable for an alleged trespass in executing the suit, unless a copy of it be previously demanded, agreeably to the 6th section of the act of the 21st of March, 1772. *Varley v. Zahn.*

xi. 185

5. A justice issued an execution, directed to the constable of the town of *B.*, distant four miles from the township of *N.*, where the defendant resided; and there being another township of *B.*, between that and the town of *B.*: held, that though there was an acting constable in the township of *N.*, and also of *B.*, yet the execution was not for that reason void.

The provisions of the act of assembly, on this subject, are only directory, and the justice is to judge who is the constable most convenient to the defendant. *Smith et al. v. Schell.*

xiii. 336

CONSTITUTION.

See ACT OF ASSEMBLY, 2, 5, 13, 14.

ARBITRATION LAW, 1. OFFICES, 2.

1. A state bankrupt law, is not a law impairing the obligation of contracts within the spirit and meaning of the constitutions of the *United States*, and of the state of *Pennsylvania*. *Farmers and Mechanics' Bank v. Smith.* iii. 63
2. The legislature had a right to pass a law for trial, by courts martial, of drafted militia, who should refuse or neglect to march to the place of rendezvous, agreeably to the orders of the governor, founded on the requisitions of the President of the *United States*. *Moore v. Huston.* iii. 169
3. When the states are prohibited expressly by the Constitution of the *United States*, from the exercise of power, all their power ceased from the adoption thereof; but where the power of the state is taken away by implication, they may continue to act until the *United States* exclude them. *Ibid.*
4. The authority of the state does not cease in the latter case, where congress have legislated partially, on a subject over which they might exercise exclusive power. *Ibid.*
5. The court have power to declare an act of assembly void, but it ought to be exercised only in a very clear case. *Ibid.*

6. An ordinance of the councils reducing the salary of the Mayor of *Philadelphia*, after the commencement of his term of service, is valid. *Commonwealth v. Bacon.* vi. 322

CONSUL.

1. It seems a consul general is not protected by the law of nations from a prosecution and indictment for rape. *Commonwealth v. Kosloff.* v. 545
2. But the state courts have no jurisdiction in such case; the exclusive jurisdiction is vested in the courts of the *United States*. *Ibid.*

CONTINGENT REMAINDER.

See COMMON RECOVERY, 1, 2. DE-
VISE, 7, 8, 9, 10, 14, 17.

The common law doctrine of forfeiture, for the purpose of barring contingent remainders has been extended to *Pennsylvania*. *Lyle v. Richards.* ix. 322

CONTRACT.

See ACT OF ASSEMBLY, 2. AGREEMENT. PASSIM. CONFIRMATION, 1. CONSTITUTION, 1. CORPORATION, 12. COUNTY COMMISSIONERS, 3, 4, 12. ERROR, 108. EVIDENCE, 103, 363. FRAUD, PASSIM. JOINT CONTRACT. PASSIM. PUBLIC OFFICES, 2. VENDOR AND VENDEE. PASSIM.

1. If members of a congregation sign a call to a minister, and engage "to provide for his comfortable and honourable maintenance, in the manner set forth in the subscription papers accompanying the call, and by such subscription promise to pay to him, or his order, the sums annexed to their names, yearly," with liberty to any subscriber to withdraw at the end of a year, they are not jointly bound for the whole subscription, but each severally to the amount of his own subscription. *Riddle v. Stevens.* ii. 537
2. It is for a jury to decide whether a contract was rescinded, when it depends upon a variety of disputed facts. *Youst v. Martin.* iii. 423
3. If a mesne conveyance, forming part of the chain of title, be mislaid by the vendor of land, it seems that the vendee, who has executed the contract in part by taking possession, cannot object to the title on that account, as the defect may be supplied by a bill *in perpetuam rei memoriam*; still less can he object to it,

when he has never by the performance of his own covenants, put himself in a situation to demand the title papers, and the lost deed has been found before the title was tendered by the vendor. *Cassel v. Cooke.*

viii. 268

4. Plaintiff sold to defendant certain goods; some time after which, the clerk of the plaintiff, who, it was admitted, had authority to give receipts for him, gave to defendant a receipt as follows: "Received, *August* 20th, 1816, of *J. B.*, seventy-three dollars and eighty-two cents, which, with goods, &c. returned, *will be in full*, and interest account to be adjusted between Mr. *D.* and the said *J. B.*" *Held*, that, in the absence of evidence to the contrary, the agreement was, that the goods should be returned, and the original contract of sale, *pro tanto* rescinded. *Bredin v. Dubarry.*

xiv. 27

CONTRIBUTION.

See **BILLS OF EXCHANGE**, 5, 8, 9.

CONVEYANCE.

See **ACT OF ASSEMBLY. EVIDENCE**, 26, 35, 36, 372.

CONVICTION.

1. A conviction for doing worldly business on the Sabbath, under the act of 22d *April*, 1794, is good, if it follows the form prescribed in the law, though it does not state when or where the work was done, or the nature of it. *Commonwealth v. Wolf.*
2. The proper mode of proceeding, for this offence, is by conviction, not by a *qui tam* action. *Ibid.*

iii. 48

CORONER.

It seems that process against a surety of the sheriff, may be directed by the prothonotary to the coroner. However that may be, the coroner is bound to execute, at his peril, all writs directed to him by a court having jurisdiction of the subject matter; and the securities of the coroner are responsible for his misconduct in the execution of such writs. *Beale's Executors v. Commonwealth, for the use of Worrell.*

xi. 299

CORPORATION.

See **ACT OF ASSEMBLY**, 1. **APPEAL**, 27, 36. **ASSUMPSIT**, 2, 3, 22, 23. **BANK. PASSIM.** **BILLS OF EX-**

CHANGE, 5, 8, 12. **COUNTY COMMISSIONERS**, 7. **EVIDENCE**, 94. **GUARDIANS OF THE POOR**, 2, 3, 4. **INDICTMENT**, 41, 46. **MANDAMUS. PASSIM.** **TURNPIKE COMPANY. PASSIM.**

1. The expulsion of a member of an incorporated society, whose charter contains the following article: "should any member neglect to pay his arrearages of contribution for three months *he shall be expelled*," without notice to the delinquent member, or a vote of the society, is illegal. *Commonwealth v. The Pennsylvania Beneficial Society.*
- ii. 141
2. Books of a corporation are evidence in disputes between members of the corporation; especially if produced on the call of the adverse party. They are not evidence against strangers. *Commonwealth v. Woelfher.*
- iii. 29
3. Where a charter required two thirds to form a quorum, and it was stated on the minutes, that on due invitation, the corporation met, and it was not usual to mention on the minutes the names or number of those present, this was *held* to amount to saying that two thirds had met. *Ibid.*
4. Where a congregation was incorporated, and a power given "to make rules, by-laws, and ordinances, and to do every thing needful for the good government and support of the congregation," *held*, that the corporation had power to make a by-law, vesting the appointment of inspectors of their elections in the president of the corporation. *Ibid.*
5. So also, that they had power to make a by-law, prohibiting tickets from being counted at an election, which had other things on besides the names. *Ibid.*
6. Having an eagle engraved on such tickets is a violation of the by-law. *Ibid.*
7. Under the charter of the *German Lutheran* Congregation, in, and near the city of *Philadelphia*, aliens, otherwise qualified, are entitled to vote. *Ibid.*
8. *Assumpsit* lies against a corporation on an implied contract. *Overseers of North Whitehall v. Overseers of South Whitehall.*
- iii. 117
9. An action of trespass on the case, lies against a corporation aggregate,

- for a tort. *Chesnut Hill and Spring House Turnpike Company v. Rutter.* iv. 6
10. It seems that if the *narr.* state that the act complained of, was *unjustly and wrongfully done*, without setting forth negatively, that it was not within the scope of the corporate powers of the company, it is sufficient; at all events it is good after verdict. *Ibid.*
11. Where the charter of a church authorized the making of by-laws, requisite for the good government of the church, and directed that the elections of ministers, &c., should be conducted agreeably to certain rules, one of which was, "that no person was to have a vote, except those who had been regularly admitted, and should have been members of the church 12 months preceding the election." *Held*, that a by-law, enacting, that no member of the church whose pew rent was in arrears for a longer time than two years, should be entitled to vote for officers, was valid. *Commonwealth v. Cain.* v. 510
12. If the charter of an incorporated company require a certain number of managers to constitute a *quorum*, for the purpose of entering into contracts, a contract, to which the seal of the corporation is affixed by a less number than are competent to make the contract, is valid, provided it be done by the direction of a legal *quorum*; and the seal itself is *prima facie* evidence that the contract has been duly entered into by the corporation. Whether or not it has been duly affixed, is matter for the consideration of the jury. *Berks and Dauphin Turnpike Company v. Myers.* vi. 12
13. Though a corporation cannot dispose of its stock, in a manner different from that prescribed by its charter, yet it may compromise a dispute respecting stock previously subscribed. *Ibid.*
14. A departure from the strict style of a corporation will not avoid its contracts, if it substantially appear that the particular corporation was intended, and a latent ambiguity may, under proper averments, be explained by parol evidence. *Ibid.*
15. An application to this court for its sanction to proposed alterations and amendments to the charter of a corporation, under the 2d section of the act of the 10th of *April*, 1791, must be made by the corporation, in its corporate character, and not by the individual members of the society. *Case of St. Mary's Church.* vi. 498
16. The court will not, on a petition of a majority of the members of an incorporated society, award a *mandamus*, to compel the body in whom the corporate powers are vested, to affix their common seal to alterations and amendments to their charter, contrary to their own judgment. *Commonwealth v. Trustees of St. Mary's Church.* vi. 508
17. A minority of the persons, in whom the trust of a school-house and school is vested by deed, cannot by associating and procuring a charter of incorporation, under the act of *April*, 1791, acquire the right to the management of them, in opposition to the will of the majority of those interested. *Commonwealth v. Jarrett.* vii. 460
18. Amendments proposed by a corporation, are not to be considered as the act of the corporation, merely because they are offered under the corporate seal; the court may inquire by what authority it is affixed. *Case of St. Mary's Church.* vii. 517
19. Where the trustees of a corporation consist of three clerical and eight lay members, if one of the clerical members be excluded from the board by a resolution of the lay members without authority, resolutions for alterations of fundamental articles of the charter, passed in the absence of such member, are unlawful. *Ibid.*
20. In corporations where there are different classes, the majority of each class must consent, before the charter can be altered, if there be no charter provision respecting alterations. *Ibid.*
21. The act of 22d *March*, 1817, "relative to suits brought by or against corporations," is not confined to banks, but extends to all corporations. *Washington and Pittsburgh Turnpike Company v. Cullen and Crane.* viii. 517
22. An agent of a corporation, who is neither president, chief officer, cashier, treasurer, nor secretary, is not authorized to enter an appeal from an award of arbitrators. *Ibid.*
23. One who acts as commissioner, to receive the subscriptions under an act to incorporate a turnpike road company, cannot, when sued by the company for the amount of his subscription, object that the \$5 per

share, payable at the time of subscription, was not actually paid by him.

The recital in a charter, granted under an act of assembly, that certain commissioners appointed in the act to take subscriptions had done so, and of their certificate to that effect, is, when accompanied with proof that the defendant subscribed for three shares in the books of the company, *prima facie* evidence of such certificate having been forwarded to the governor. *Grayble v. York, &c. Turnpike Co.* x. 269

24. After pleading to a declaration charging them as a corporation, and going to trial, as such, in the Court of Common Pleas, the defendants cannot, on a writ of error, take advantage of the suit having been commenced against them before the justice in their individual characters. *Overseers of the Poor of Roxborough v. Bunn.* xii. 292

25. A foreign attachment lies against a corporation, incorporated by the laws of another state. *Bushel v. Commonwealth Insurance Company.* xv. 173

COSTS.

See ARBITRATION, 30, 31, 33. ARBITRATION LAW. ARBITRATORS, 7. COURT OF COMMON PLEAS, 1, 2. EXECUTORS AND ADMINISTRATORS, 28. FEES, 3, 4, 5, 6, 7, 8, 10, 11, 14, 15, 17, &c. GUARDIAN, 3. JUSTICE OF THE PEACE, 7. LIBERARI FACIAS, 2, 3, 4.

1. Where in an action of *tort* in this court, the plaintiff lays his damages at \$500 or upwards, and the jury find a less sum, he is entitled to costs. In cases of *tort*, the sum demanded in the *narr* is the matter in controversy. *Hancock v. Barton.* i. 269

2. Juries cannot give costs where the law denies them. *Sneively v. Weidman.* i. 417

3. Under the act of 29th of March, 1810, the Supreme Court cannot, on a writ of error, inquire whether new evidence was given by the defendant, on appeal, so as to preclude the plaintiff from costs. The court below are judges whether new evidence was given or not. *Mixell v. Bradford.* ii. 488

4. It is well settled that a plaintiff, though he does not receive more

than 100 dollars in the common pleas, shall have his costs, if his cause of action was reduced to 100 dollars or less by a set-off. *Shear v. Jamieson.* ii. 530

5. If arbitrators, chosen by consent, in such case award for the plaintiff 100 dollars, and that the parties shall each pay their own costs, the plaintiff, notwithstanding, shall recover his full costs. *Ibid.*

6. And if judgment be given for full costs by the Common Pleas, the Supreme court cannot inquire into facts not appearing on the record. *Ibid.*

7. Where the plaintiff brought debt in the Common Pleas, on a single bill for 100 dollars, due on the sale of a horse, and the defendant set up a warranty of the horse and breach thereof, in consequence of which the jury gave the plaintiff a verdict for \$85,31 cents, and six cents costs; the plaintiff was held to be entitled to full costs. *Sadler v. Slobaugh.* iii. 388

8. Under the existing acts of assembly, in all cases where this court has jurisdiction, costs are of course. Therefore a plaintiff is entitled to costs, though he recover less than 50 pounds, provided the matter in controversy be 500 dollars or upwards. *Wurts v. M'Faddon.* iv. 78

9. If a declaration on a policy of insurance contain a count for a total loss, and a count for money had and received, &c., for a return of premium, and the jury find a verdict for the defendant on the first count, and on the count for money had and received, &c., a verdict for the plaintiff for a less sum than 500 dollars, the plaintiff is entitled to costs; all disputes arising out of the same policy being the matter in controversy between the parties. *Ibid.*

10. If a defendant be acquitted on an indictment, founded on the act of the 31st of March, 1806, to restrain the practice of duelling, the jury may direct that he shall pay the costs, though the indictment be defective. *Commonwealth v. Tilghman.* iv. 127

11. In an action of trespass *quare clausum fregit*, if the jury find less than 40 shillings damages, for plaintiff, and full costs, he is entitled to recover full costs, though there is no certificate by the judge, agreeably to the 16th section of the statute 22 and 23 C. II. c. 9, that the freehold

- or title of the land was chiefly in question. *Hinds v. Knox*. iv. 417
12. Costs upon an indictment are remitted by a pardon before judgment. *Duncan v. The Commonwealth*. iv. 449
13. If the grand jury return a bill "*ignoramus*," in a case other than felony, and order the prosecutor to pay the costs, and the prosecutor after having been sentenced by the court to pay them, is committed, and then discharged according to law, without having paid them, the county is not liable to costs. *The Commonwealth v. The Commissioners of Philadelphia County*. iv. 541
14. Nor is the county liable, if a bill be found "a true bill," and the defendant having been tried and acquitted, and ordered by the petit jury to pay the costs, is sentenced by the court to pay them, and is committed and discharged according to law, the costs not being paid. *Ibid.*
15. Nor if the defendant be acquitted, and the prosecutor ordered by the petit jury to pay the costs, who, after being sentenced by the court to pay them, is committed and discharged according to law, the costs being unpaid. *Ibid.*
16. If a defendant in an action of *tort* appeal from an award of arbitrators, and obtain a verdict more favourable than the award, he is, by the provisions of the arbitration law, exempted from the payment of the costs which accrued upon the appeal, and it is not in the power of the jury by their verdict, to subject him to the payment of such costs. *Lentz v. Stroh*. vi. 34
17. If arbitrators in an action of slander award for the plaintiff five dollars, with costs of suit, he is entitled to full costs. *Gouer v. Clayton*. vi. 85
18. In trespass, commenced originally in the Court of Common Pleas, if plaintiff lay his damages at more than 100 dollars, and recover less than that sum, he is entitled to costs. *Clark v. McKisson*. vi. 87
19. On an appeal by defendant from an award of arbitrators, if the plaintiff obtain a verdict for a smaller sum than the award, the defendant is not entitled to a return of the costs paid on the appeal; and with respect to the costs accrued since the appeal, each party is to pay his own costs. *Pratt v. Naglee et al.* vi. 299
20. A judgment for costs given under an existing law, is not affected by a subsequent repeal of the law. *Bechtol v. Cobaugh*. x. 121
21. An appeal by a defendant from a justice, if the plaintiff recover less in the Court of Common Pleas, than he did before the justice, and the defendant has produced evidence which he did not give before the justice, the plaintiff will recover his costs before the justice, but each party must pay his own on the appeal. *Kimble v. Saunders*. x. 193
22. Where an indictment has been returned, "a true bill," the prosecuting officer cannot enter a *nol. pros.*, with the consent of the court, and charge the county with the costs of prosecution. *Agnew v. Commissioners of Cumberland*. xii. 94
23. On an appeal by the defendant from a justice of the peace, if the plaintiff recovers less on an award of arbitrators than he did before the justice, he is not entitled to costs, nor can the arbitrators give them to him. *Downs v. Lewis*. xiii. 198
24. If on the appeal of the defendant from an award of arbitrators, referees under the act of 1705, find a less sum in favour of the plaintiff, than was awarded by the arbitrators, the plaintiff is not entitled to costs, nor can the referees award them to him. *Holdship v. Alexander*. xii. 280
25. When this court reverses a judgment, and orders a *venire facias de novo*, it has a right to impose terms as to costs. But, where no terms are imposed, all the costs abide the final event of the suit. *Work v. Lessee of Maclay*. xii. 265
26. On an award of arbitrators in trespass *quare clausum fregit*, in favour of the plaintiff, for one dollar and the costs of suit, the plaintiff is entitled to full costs. *Wilkinson v. Gray*. 345
27. Where there are several actions depending by same plaintiff against different defendants, and the parties agree that the verdict and judgment in one case shall govern all, and the same witnesses are examined in each suit, the plaintiff is not entitled to recover from each defendant the costs for the attendance of each witness, and the mileage. *Curtis v. Buzzard*. xv. 21
28. Plaintiff obtained judgment before a justice of the peace, on the 31st of January, 1822, for thirty dollars and costs. Defendant appealed, and gave evidence not given before the justice, and verdict and judgment were rendered for the plaintiff for thirteen

dollars, on the 3d of *May*, 1823. *Held*, that the plaintiff was entitled to his costs before the justice, each party paying his own costs on the appeal, notwithstanding the 9th section of the act of the 28th of *March*, 1810, that section being repealed on the 1st of *April*, 1823, before the verdict. *Grace v. Altemus*. xv. 133

COSTS OF PROSECUTION.

1. The fifteenth section of the act of the 23d *September*, 1791, entitled, "a supplement to the penal laws of of this state," is not repealed by the act of the 28th of *March*, 1814, entitled, "an act establishing a fee bill." Therefore, where a person, sentenced to death or hard labour, has not sufficient property to pay the costs of prosecution, they are to be paid by the county in which the crime was committed. *Commonwealth v. Commissioners of Philadelphia County*. ii. 290
2. But payment by the county does not discharge the convict, who remains liable for the costs under the judgment, until discharged under the insolvent laws. *Ibid*.
3. Where the same person is convicted of divers offences at the same term or sessions, the costs of prosecution, on one indictment only, are to be paid out of the county stock. *Ibid*.
4. The county is not liable for the costs of an attachment, against a witness, for contempt. *Ibid*.

COVENANT.

See ACTION, 2. ANNUITY. CONTRACT, 3. DEED, 11, 12, 13, 14. INDEMNITY, 1. PAROL EVIDENCE, 1, 2. PLEADING, 3, 34. STATEMENT, 2.

1. Where in covenant, for breach of warranty, issue is joined on the title of the defendant, it is not necessary for the plaintiff to show, that he took any measures to complete the title of the defendant. *Clarke v. M'Anulty*. iii. 364
2. A covenant of warranty is not broken without eviction, which must be laid in the *narr*. *Ibid*.
3. It is not a good assignment of a breach of warranty against all but the proprietary, that the defendant had no title; especially, if it was known to both parties, that there was no more conveyed in the deed than a right of pre-emption. *Ibid*.

4. Covenant by an assignee of the reversion, under the statute 32, Henry 8, c. 34, is transitory. *Henwood v. Cheeseman*. iii. 500
5. If a lease contain a covenant not to assign without the consent of the lessor, and the lessee assign, without his consent, the acceptance of an assignment of the lease from the assignee of the lessee, will not affect the lessor's right of action for a breach of the covenant not to assign. *Hazlehurst v. Kendrick*. vi. 446
6. Where covenants are mutual and concomitant, one party cannot call upon the other to perform his part of the contract, without having actually performed, or tendered performance of his own. *Cassell v. Cooke*. viii. 268
7. The covenants arising from the words, "*grant, bargain, and sell*," in a deed, are not inconsistent with, or restrained by an express covenant of special warranty. *Funk v. Vonneida et al. Executor of Bechtoll*. xi. 109
8. When the grantor, prior to the execution of the deed, had mortgaged the premises, it was *held*, that the grantee was entitled to recover, in an action upon those covenants, at least nominal damages, notwithstanding the mortgage was not due at the commencement of the suit, and no actual damage was proved. *Ibid*.
9. If the grantee, in his declaration, had assigned specially the consequential damages arising from the breach of the covenants, stating that the land was of less value by reason of the incumbrance; that he was prevented from selling it as advantageously as he might otherwise have done, and that in fact it was sold by process of law, for so much less than the value of the mortgage, he would have been entitled to damages to the full value of the mortgage. *Ibid*.
10. *Query*, Whether the grantee, by calling on the grantor to remove the incumbrance, would be entitled to recover the value of the mortgage where there had been no sale, no eviction, and even before the mortgage became due. *Ibid*.
11. Where, in the body of a sealed instrument, the covenants are stated as if they were made by a corporation, directly with the plaintiff, without the agency of any one, and the de-

fendant is not named, but signs the instrument, and seals it with his own seal, as president of the corporation, and on their behalf; an action cannot be sustained upon it against him individually. *Hopkins v. Mehaffy*.

xi. 126

12. The *narr* in covenant by the apprentice against his master, set forth, that the plaintiff put himself to the defendant, to learn the trade and mystery of dying and fulling, which the defendant then professed to follow, and the usual covenants, on the part of the apprentice, and that the master, in consideration of their performance, was to provide sufficient sustenance, apparel, and schooling, and give him two sufficient suits of freedom clothes; the breach assigned was, that the defendant did not teach the plaintiff the art, &c. of fulling and dying, but kept him at other business; nor give him two suits of clothes, and schooling: *held*, bad after verdict. *Pumeroy v. Bruce*.

xiii. 186

COVERTURE.

See PLEADING, 57, 58.

COUNTERFEIT.

One receiving a counterfeit note from an innocent person in payment, and keeping it by him six months, without notice, is guilty of gross negligence, and must sustain the loss. *Raymond v. Baar*.

xiii. 318

COUNTY COMMISSIONERS.

See SUPREME COURT, 1, 2, TAXES, 6, 11.

1. The sheriff cannot recover from the commissioners, fees for summoning grand and petit jurors in criminal cases, and general jurors in civil cases, even as the law stood prior to the act of the 28th of March, 1814. *Erwin v. Commissioners of Northumberland County*.
i. 505
2. *Query*, Whether county commissioners are liable, as such, to an action of implied *assumpsit* or to any kind of action. *Ibid*.
3. County commissioners have power to purchase every thing necessary, (*e. g. chairs*,) for the accommodation of the persons employed in conducting the general election. *Commonwealth v. Commissioners of Philadelphia County*.
ii. 193
4. A contract made by the county commissioners with one of their

own board, is contrary to the act of the 21st of March, 1806, and void.

Ibid.

5. The court will not grant a *mandamus* to county commissioners to compel the payment of interest on an order drawn by them on the county treasurer. *Commonwealth v. Commissioners of Philadelphia County*.
iv. 125
6. The law will not imply a promise to pay debts due from a county by individuals, who, when the suit was brought, were county commissioners, but who were not so when the debts originated, and who had ceased to be so, before the suit was tried. *Lyon v. Adams*.
iv. 443
7. *Query*, Whether county commissioners constitute a corporation liable to be sued? If they do, the suit should be against the corporation, without naming the commissioners individually. *Ibid*.
8. It seems, however, that the only remedy for the recovery of debts due from a county, is, by applying for a *mandamus*, commanding the commissioners to draw an order on the county treasurer. *Ibid*.
9. The commissioners of *Allegheny* county had authority under the act of the 26th of February, 1817, to purchase ground for the erection of a new jail, without the consent and approbation of the grand jury and Court of Quarter Sessions. *Commissioners of Allegheny County v. Lecky*.
vi. 166
10. This power might be legally executed by two commissioners, without the concurrence of the third. *Ibid*.
11. It was not necessary under that act, that the commissioners should sell the old jail, before they purchased ground for the erection of a new one. *Ibid*.
12. Nor was it necessary that the contract between the commissioners and the vendor, should contain a stipulation, pledging the proceeds of the sale of the old jail, for the payment of the ground purchased. *Ibid*.

COURT.

See ACT OF ASSEMBLY, 11. BILL OF EXCEPTIONS, 2, 3, 4, 10, 11. BOOKS AND WRITINGS, 1, 2, 3, 4, 5, 6. BREAD ACT. ERROR, 8, 9, 19, 23, 24, 33, 34, 36, 42, 43, 44, 45, &c. EVIDENCE, 132. MANDAMUS, PASSIM. NEW

- TRIAL, PASSIM. NOTICE, 3, 6.
 QUARTER SESSIONS, PASSIM.
 RECOGNIZANCE, 1, 3, 4, 5, 6,
 7. SET-OFF, 14, 25. SUPREME
 COURT. SPECIAL COURT. VER-
 DICT, 3, 5. WRIT OF ERROR,
 PASSIM. WRITTEN INSTRUMENTS,
 1.
1. The counsel for either party have a right to ask the opinion of the court on any point of law arising out of the evidence and pertinent to the issue. But they have no right to ask an opinion on matter of fact. *Browne v. Campbell.* i. 176
 2. In a case consisting of evidence, written and parol, the defendant's counsel have no right to ask an opinion, whether on the whole the plaintiff has supported his action. *Ibid.*
 3. The court are not bound to answer what the law is upon the whole evidence. Their opinion can be asked only on specific facts, granted or supposed. *White v. Kyle's Lessee.* i. 515
 4. The judgment of the Supreme Court on the same facts, is binding as a rule of property. But whether the facts are the same, the jury must judge. *Ibid.*
 5. When a question is distinctly proposed to the court, the party proposing it is entitled to a distinct answer, and it is error to refuse or evade it. *Smith v. Thompson.* ii. 49
 6. If the record still remains in the Supreme Court, the reversal of an execution may be awarded at a subsequent term, and the record transmitted. *Cassel v. Duncan.* ii. 57
 7. The court are not bound to give an opinion on facts. But a refusal or omission to give an opinion on a point of law requested and material to the issue, is error. *Hamilton v. Menor.* ii. 70
 8. In proceedings against a husband for desertion, &c., a *certiorari* lies from the Supreme Court to the Quarter Sessions to remove their order. *Overseers of the Poor v. Smith.* ii. 363
 9. The jurisdiction of the Supreme Court is only taken away by express words or irresistible implication. *Ibid.*
 10. *Query*, If the jurisdiction of the court extend to cases, which are brought before the sessions by appeal? *Ibid.*
 11. If a party desires a more particular opinion than the court gives, it is his duty to state the point; and then the court is bound to answer. *Kean v. M'Laughlin.* ii. 469
 12. The court are not bound to instruct the jury to find for either party on the whole evidence. It is merely their duty to inform them as to the law, leaving the decision of the facts entirely to them. *Galbraith v. Black.* iv. 207.
 13. Where a judge has expressed himself in such a manner as to be understood by a jury, this court will not reverse the judgment on critical objections to his language. *Ibid.*
 14. The court may express an opinion on the facts of a case, without at the same time informing the jury that they may and ought to judge for themselves; but nothing should appear in the charge from which the jury may reasonably infer, that they are precluded from considering the facts. *Sampton v. Sampton.* iv. 329
 15. The court are not bound to answer an abstract question, without applying the general principles of law to the case before the jury, and making such observations, and distinctions as they may deem necessary. *Graham v. Moore.* iv. 467
 16. The time and manner of examining witnesses is in the discretion of the court before whom the trial takes place. *Duncan v. M'Cullough.* iv. 480
 17. Under what circumstances the court will refuse to permit the plaintiff to introduce new evidence after the defendant's counsel has begun to address the jury. *Ibid.*
 18. *Query*, Whether this court will reverse for error, on a point in which the law permits the inferior court to exercise discretion? *Ibid.*
 19. The last monday in *July* is merely a court to receive the return of writs, and to make rules, and orders preparatory to trials. It is not a term, at which a judgment can be taken for want of an appearance. *Insurance Company of Pennsylvania v. Passmore.* iv. 507
 20. The court are not bound to instruct the jury whether a judgment in the suit can be executed against the defendant, he having been discharged by an insolvent act from his debts. *Kean v. Franklin.* v. 147

21. On an issue on the validity of a patent right, the judge is bound to instruct the jury on the validity of conflicting patents in a suit by a vendor against a vendee of such a patent right, though all the parties interested in those patents are not before the court. *Bellas v. Hays*. v. 427
22. The court are bound to instruct the jury on points proposed by counsel on the trial relevant to the issue, though they are not noticed in the argument; but they may regulate the practice otherwise by rule of court. *Ibid.*
23. On a bill of exceptions to the admission of a paper, for want of proof of its authenticity, a court of error will permit no objection to be made, which was not urged below. *Berks and Dauphin Turnpike Company v. Myers*. vi. 12
24. The court are bound to decide on the construction of a written instrument, where matters of facts are not intermingled; and it is error in such case to leave the construction to the jury. *Denison's Executors v. Wietz*. vii. 372
25. The court are not bound to charge the jury, whether any facts have been given in evidence, whence a legal presumption can be raised of such fraud as would invalidate a will. The most they can do is, to instruct the jury what the law would be, in case the jury should be of opinion that certain facts were well proved. *Irish v. Smith*. viii. 573
26. The court are not bound to answer an abstract question. *Ibid.*
27. The Court of Common Pleas, has no authority to direct the transcripts of judgments of a justice, entered on the records by virtue of the act of the 19th of April, 1794, to be stricken off the docket. *Dailey v. Gifford*. xii. 72
28. If the court is not called upon to instruct the jury on any particular point, and in its general charge lays down the general principles of law correctly, the judgment will not be reversed, because a more pertinent charge might have been given. If there are particular circumstances which exempt the case from the general rule, it is the business of counsel to ask the court's opinion of the law on those circumstances. *Barton v. Glasco*. xii. 149
29. Where the evidence is discordant and contradictory, the court are not bound to instruct the jury, that it results from the evidence as matter of law, that after the sale of property to the plaintiff, the possession continued in the vendor, or was at least a mixed possession; and that therefore the sale was fraudulent and void. In such cases the jury are to be instructed in matters of law, and left to decide the facts on their own judgment. *Babb v. Clemson*. xii. 328
30. The court ought not to be asked to state to the jury, as facts, matters disputed in the evidence, and to be decided by the jury. *Maus v. Montgomery*. xv. 221

COURT MARTIAL.

See MILITIA, PASSIM.

1. If a court martial be authorized to fine or degrade, and do both, and the governor approve the fine and disapprove the rest, the sentence is good for the fine. *Hutton v. Blaine*. ii. 75
2. The president of a court martial who issues a warrant, is responsible for gross impropriety in the proceedings. But the constable, who executes it is justified, if the court have jurisdiction, be constituted according to law, and have passed a lawful sentence. *Ibid.*
3. The constable is not put to proof that five of the members agreed, though the law requires it, if it appear on the proceedings that the court passed sentence. *Ibid.*

COURT OF APPEAL.

See MILITIA, PASSIM.

COURT OF COMMON PLEAS.

See DISTRICT COURT, PASSIM.

JUDGMENT, 60.

1. The Court of Common Pleas of Philadelphia county have original jurisdiction in civil actions where the demand is under one hundred dollars, but the plaintiff cannot recover costs. *Kline v. Wood*. ix. 294
2. Judgment entered in the Common Pleas on a bond and warrant in the penal sum of five hundred dollars, but the plaintiff recovered less than one hundred dollars not having made a previous affidavit: held, that he was not entitled to costs. *Stewart v. Mitchell*. xiii. 287
3. The Courts of Common Pleas have power to entertain a motion to

strike off or open a judgment, or to order a feigned issue for the purpose of ascertaining necessary facts. *Kellogg v. Krauser.* xiv. 137

COURT OF ERROR.

See COURT, 23. SUPREME COURT.

COURT, ORDER OF.

An erroneous order of the court made in the absence of the party affected will not bind him, where the party claiming exemption by virtue of such order was before the court, and neglected to apprise the court of the facts. *Mitchell's Administrators v. Stewart.* xiii. 295

CREDIT.

See ACTION, 11. VENDOR AND VENDEE, 1, 5.

CREDITORS.

See EXECUTORS AND ADMINISTRATORS, 12, 26, 30.

1. A judgment creditor of an insolvent intestate cannot gain a priority over other judgment creditors by taking out against him, and levying on his goods a *fiery facias* which relates to a day prior to the intestate's death. *Leiper v. Lewis.* xv. 108
2. Such *fiery facias* and levy are good where the estate is solvent. *Ibid.*

CRIMES AND MISDEMEANORS.

1. One may be made liable criminally by the acts of his agents, if he had a participation in them; and the jury may deduce such participation from circumstantial evidence. *Commonwealth v. Gillespie.* vii. 469
2. A conspirator may be convicted in the place where the overt act is done, in pursuance of the conspiracy. One who procures a misdemeanor to be committed, is guilty in the place where it is committed by the procuree. *Ibid.*
3. The punishment of larceny cannot exceed three years' imprisonment at hard labour. *Grimes v. Commonwealth.* xv. 75
4. It is not constructive larceny if one, by fraudulent means, induces another to part with the property in goods, and to deliver the possession of them absolutely; this description of larceny is confined to the cases where the party intended only the delivery of possession. *Lewer v. Commonwealth.* xv. 93

CRIMINAL CONVERSATION.

See EVIDENCE, 187.

CUSTOM.

See USAGE, 1, 2.

CUSTOM HOUSE BONDS.

See BANKRUPT, 1.

DAMAGES.

- See ASSUMPSIT, 28. BANK, 18, 19. COSTS, 11. DECLARATION, 10, 11. NEW TRIAL, 6, 11. PRACTICE, 24, 26. SET-OFF, 28. TROVER, 5.
1. The act of assembly, of the 21st of March, 1772, which declares that if a distress and sale be made when no rent is in arrear, the owner of the goods may, by action of trespass or on the case, recover double their value, does not prevent the party aggrieved from bringing an action at common law, for entering his close, &c., in which he may recover damages to a greater amount than double the value of the goods. *Rees v. Emerick et al.* vi. 286
 2. The jury having assessed damages in an action of trover, at what appeared to them, under all the circumstances, to be a reasonable compensation for the injury sustained, the court refused to set aside the verdict, on an allegation that the damages were excessive. *Dennis v. Barber et al.* vi. 420
 3. Under the act of the 8th of March, 1815, the mortgagor is the owner within its meaning, so as to be entitled to sue for damages for injury to the land; the mortgagees cannot interfere before judgment, though it seems they may claim afterwards, by motion to take the money out of court. *Schuylkill Navigation Company v. Thoburn.* vii. 411
 4. In estimating the damages, the jury are to value the injury to the property at the time it was suffered, without reference to the person of the owner, or the state of his business; and the measure of such damage is the difference between what the property would have sold for, as affected by the injury, and what it would have brought unaffected by such injury. *Ibid.*
 5. Where there has been an eviction of a valuable part of a tract of land, which has been *unfairly* sold, the measure of damage is the amount of injury sustained by the loss of the land, and not the average price agreed to be paid for the whole tract. *King v. Pyle.* viii. 166

6. *Query*, What the rule would be, if the sale were fair? *Ibid.*
7. In an action on the case, in the nature of a writ of conspiracy, for fraudulently withdrawing the goods of the defendant, in an execution from the reach of the plaintiff; the standard of damages is the value of the goods withdrawn, and not the amount of the judgment on which the execution issued. *Penrod et al. v. Mitchell.* viii. 522
8. In an action for the non-delivery of a quantity of whiskey on a particular day, according to contract, the enhancement of the price of the article by the operation of excise laws, passed subsequently to the contract, does not affect the quantum of damages. *Edgar v. Boies.* xi. 445
9. The detention of a machine, to prevent the plaintiff from using it as a model in the construction of others, is a circumstance proper for the consideration of the jury, in assessing damages. *Berry v. Vantries.* xii. 89
10. In an action on a bill of lading, for loss in carrying goods, the measure of damages is the nett value of the goods at the port of destination. *Gillingham et al. v. Dempsey.* xii. 183
11. Where the plaintiff in *Charleston*, having in his hands goods of the defendant nearly sufficient to satisfy his demand, without permission of the defendant, drew upon him, and the draft was protested for non-acceptance. *Held*, that the plaintiff could not recover the damages which he was compelled to pay, in consequence of the draft being protested; especially as it was at a much shorter sight than was usual between *Charleston* and *Philadelphia*. *Rouvert v. Patton.* xii. 253
12. The act of the 22d of *May*, 1722, authorizing the court to inquire of damages on judgment by default, by the jury attending at the same or next court, is not obsolete. *Wright v. Crane.* xiii. 447

DEATH.

See ASSAULT AND BATTERY, 3. PRESUMPTION, 1, 2, 7.

DEBT.

See COUNTY COMMISSIONER, 6. JOINT SUIT, 1, 2, 3. PLEADING, 23, 32, 33, 37, 42, 44, 45, 58. SOLDIER, 1.

1. A., by will, directed his just debts to be paid; and as to the rest, residue, and remainder, as follows, &c. He gave his wife all his real and personal estate during her life, to be work-

ed in the manner it had usually been. He directed an inventory to be taken of his personal estate, with power to his wife to bequeath one half thereof, &c. He devised his lands and improvements to his nephew in fee, on his attaining twenty-one, and after his wife's death charged with legacies to the amount of 2000 dollars. The personal estate was worth 6479 dollars, 92 cents; the land 4000 dollars, and the debts amounted to 5584 dollars, 66 cents. *Held*, that the personal estate was first to be applied to the payment of his debts. *Todd v. Todd's Executors.* i. 453

2. Lands are liable to the debts of a deceased person; yet, the personal estate is to be first applied, unless the contrary is directed by the testator. *Ibid.*
3. On the death of A., his real estate descended to three married daughters. Proceedings were had in the Orphan's Court, by which the estate was divided and appraised in three parts, one of which was taken at the valuation, by each of the husbands, in right of his wife. *Held*, that one of the husbands, who took the estate which was valued at the lowest sum, was entitled only to an estate for life in it, and that on his death it was not liable for his debts. *Blocher v. Carmony.* i. 460
4. Debt by the assignee of the reversion, is local. *Henwood v. Cheeseman.* iii. 500
5. A verdict for plaintiff, in debt, finding more than the sum demanded as debt, appearing by calculation to be for debt and interest, is informal, but may be moulded into form by considering the surplus as damages, and is not error. *Friedly v. Sheetz.* ix. 156

DEBTOR.

See FRAUD, 4, 6, 14, 17, 18, 19, 20, 21, 22, 23.

DECEDENT.

See INTESATE, 1, 2, 3, 4, 5, 6.

DECLARATION.

See ACCOUNT RENDER, 5. AMENDMENT, 8. ARBITRATORS, 5. ASSIGNEES, 5, 6. BOND, 3. CORPORATION, 10. COVENANT, 4, 12. EJECTMENT, 40. EVIDENCE, 67. JOINT SUIT, 1, 2, 3. JUSTICE, 1. MALICIOUS PROSECUTION, 1. PLEADING. PASSIM. PRACTICE, 5, 6, 7, 8, 9. PROMISSORY NOTE, 16. REFEREES, 2. SCIRE FACIAS, 5. SLANDER, 6.

1. If there be two counts in a declaration, and one of them state a cause of action which had not accrued when the suit commenced, and a general verdict be found for plaintiff; the judgment must be reversed. *Stewart v. M^r Bride.* i. 202
2. A plaintiff who sues as administrator, *cum testamento annexo*, during the absence of the executor, must aver, in his declaration, that such executor continued to be absent at the time of bringing the action; and an omission to do so is fatal. *Lewis v. Ewing.* iii. 44
3. But if the defendant pleads to the merits, the error is cured. *Ibid.*
4. But such defect is not cured where judgment is obtained by default, for want of an affidavit of defence; nor by the act of the 21st March, 1806. *Ibid.*
5. The omission in the *narr*, in a suit on special agreement, to allege specially the breach or notice to perform it, are cured by verdict. *Weigley's Administrators v. Weir.* vii. 309
6. If the declaration on a bond, for the purchase money at sheriff's sale, omit to state a sale, it would be bad on demurrer; but if the defendant go to trial after pleading payment, and giving notice of special matter, which sets forth the sale, the defect is cured by the verdict. *Friedly v. Sheetz.* ix. 156
7. A declaration in assumpsit, by a vendor, on a contract of sale of real estate, ought to state a positive assumption by the defendant, and if the vendor contracted to make a good title, that he was seised of a good estate in fee simple. *Hampton v. Speckenagle.* ix. 212
8. It seems a general averment that the plaintiff was ready and willing, and offered to perform his part of the contract, is good after verdict. *Ibid.*
9. If a general verdict be given on several counts, some of which are for demands not within the jurisdiction of the court, it is bad for the whole. *Kline v. Wood.* ix. 294
10. Where a suit is brought, in November, 1818, and one count, in the declaration, averred, that in consideration that the plaintiff, at the special instance, &c. of defendants, agreed to suffer them to occupy certain premises for the term of four years, commencing in August, 1816, and to board one of the defendants, the plaintiff did suffer them to occupy the same, for the said term of four years, and boarded one of the defendants, and a general verdict was given. *Held*, that though on demurrer it would be a fatal objection, that the jury gave damages for a period after the commencement of the suit, yet the defect was cured by verdict. *Crouse v. Miller.* x. 155
11. Though there be two declarations, and one omit the damages, yet the verdict and judgment are good. *Peddan v. Hopkins.* xiii. 45
12. If a second declaration is filed, the court, on error brought after verdict, will presume leave of the court was granted, though nothing appears on the record to show it. *Ibid.*
13. A declaration in trover for rye, stating that the plaintiff was lawfully possessed of the rye, which he lost, and which came to the hands of the defendant, by finding, and that the defendant, well knowing the said rye to be the property the plaintiff, converted it to his own use, is good after verdict. *Good v. Harnish.* xiii. 99
14. In *assumpsit* against executors, upon a consideration existing in the lifetime of the testator, the declaration need not aver assets. *Malin v. Bull.* xiii. 441
15. In a suit by one surety against another for contribution of money recovered against the plaintiff, the declaration need not aver notice to the defendant of the former suit. *Ibid.*
16. A count of an assumption by the testator in his lifetime may be joined with one founded on the assumption by the executors after his death. *Ibid.*

DECREE.

See APPEAL.

DEED.

See ACKNOWLEDGMENT, 1, 2, 3, 4.

ARTICLES OF AGREEMENT. ASSIGNMENT, 3, 9, 10. CONDITION, PASSIM. DOWER, 3, 6, 10, 11, 12. ERROR, 57. EVIDENCE, 20, 21, 33, 34, 85, 116, 171, 257, 332. JUSTICE, 28, 29. OVERPLUS, 1. PAYMENT, 1. PLEADING, 22, 23. RECORDING ACT, 1. SHERIFF, 16, 17, 20. TAXES, 6, 7.

1. An acknowledgment before an associate judge of *Bedford* county, of a deed dated 1772, conveying lands in *Westmoreland* county is valid. *M^r Ferran v. Powers.* i. 102

2. The rule that no man shall be permitted to impeach his own deed, applies only to negotiable instruments. *i. 102*
3. A grantor in a deed is a good witness to invalidate it. *Ibid.*
4. A deed may be read to the jury, if one of the two subscribing witnesses is dead, and his handwriting proved, and no such person as the other can be heard of, after diligent search. *Powers v. M'Ferran. ii. 44*
5. A deed dated the 22d of May, 1772, is good without having been recorded. *Ibid.*
6. *Query*, Whether cases of gross negligence, by which others are injured, form any exception to this principle? *Ibid.*
7. A. made a deed, dated January 10th, 1776, which was not recorded, and died intestate in 1790, leaving two brothers and a sister his heirs. One of the brothers, (but whether the eldest or not, does not appear,) conveyed the land for a valuable consideration to B. *Held*, that A's deed, not being recorded, was totally void, as respected B., if the brother who conveyed was the eldest; and, if not the eldest, it was void so far as respected such brother's share of the inheritance. *Ibid.*
8. Land held under a descriptive warrant, and payment of purchase money can be transferred only by deed. *Query*, As to warrants not descriptive. *Woods v. Lane. ii. 53*
9. Where a deed is executed by three attornies in fact, the acknowledgment should be by all the attornies, as the act of their principal, not as their own. *Lessee of Peters v. Condron. ii. 280*
10. The probate of a deed, before the Recorder of the city of Philadelphia, made on the 16th of May, 1803, for lands in Huntingdon county. *Held*, void. *Ibid.*
11. Where, by articles for the sale of land, the plaintiff was to give a lawful deed of conveyance, and the defendant was to procure a commissioner's deed to be made to the plaintiff for the same; the commissioner's deed was made to the defendant, who never conveyed to the plaintiff. *Held*, that the plaintiff could not recover the consideration money without making, or offering to the defendant, a deed of conveyance. *Dearth v. Williamson. ii. 498*
12. By a lawful deed of conveyance, in an agreement, may be fairly understood a deed conveying a lawful or good title. *Ibid.*
13. When the plaintiff covenants to make a lawful title, he is bound to produce his title to the defendant, and offer himself ready to execute a deed. *Ibid.*
14. When a seller of land covenants, that upon the payment of the purchase money, he will convey a good title to the purchaser, (without any mention of such conveyance as the purchaser shall devise,) he must prepare, and tender the deed of conveyance. *Sweitzer v. Hummel. iii. 228*
15. *Query*, who is to pay the expense of such deed, where the articles of agreement are silent? *Ibid.*
16. A water right, appurtenant to a mill, passes by the word "appurtenances," and a vendor is not bound to insert the word "privileges," in a deed for the purpose of conveying that right, though it may be contained in the contract between the vendor and vendee. *Pickering v. Stapler. v. 107*
17. Though such vendor declare at the time such deed was to be executed, that he neither bought nor sold the water right, such declaration is of no importance, if the deeds convey the right. *Ibid.*
18. If the vendor bind himself to execute a deed, and deliver possession, and the vendee refuse to accept the deed on account of an alleged defect in it, he cannot entitle himself to damages, by showing that the vendor was not able to deliver possession. *Ibid.*
19. A deed dated in 1772, need not to have been recorded; nor is the right derived by such deed impaired in equity, by being kept secret for more than forty years; and the grantor's keeping possession, and enjoying the land as his own, without recording, or notice thereof, even as respects a *bona fide* purchaser without notice. *Keller v. Nutz. v. 246*
20. The recording of a deed, between third persons, is not notice to a purchaser at sheriff's sale, who, does not claim under the deed. *Ibid.*
21. An agreement under defendants' seal, is evidence on the plea of *non est factum*, though the other contracting party is a third person, whose authority, as agent of plaintiff, is not shown. *Bellas v. Hays. v. 427*
22. If an agent sign and seal a deed in

- his own name, it does not bind his principal, though the deed purports to be made between the defendant and the principal by such agent: nor will any confirmation by such principal, short of sealing the deed, render him liable upon it. *Ibid.*
23. In such case, as the one party is not bound, so neither is the other. *Ibid.*
24. Where a deed describes land by natural boundaries, courses, and distances, by reference to the map of a partition of an estate, and also by quantity, there is no implied covenant that the quantity of land conveyed shall equal the quantity mentioned in the deed. The grantee has a right to all the land within the boundaries. *Large v. Penn.* vi. 488
25. By recording a deed, the grantee does not relinquish any other title he may possess independent of the deed. *M^cIrvine v. M^cIrvine.* vi. 559
26. An exemplification, certified by the recorder of the county, of a deed conveying land lying in that and another county, is evidence in a dispute concerning the latter. *Leazure v. Hillegas.* vii. 313
27. A deed under the seal of a banking corporation, within this state, incorporated by act of assembly, is not evidence, unless the seal be proved. It is not necessary that such proof should be by one who saw the deed sealed; but the impression must be proved, by one who knows the motto, device, &c. *Ibid.*
28. A deed for land, accepted by the vendee after articles of agreement, though it differ in some respects from the articles, is to be considered as expressing the ultimate intent of the parties, where there is no misconception of the deed by either party. *Crotzer v. Russel.* ix. 78
29. A deed from a person who has no written title, but claims by settlement, cannot be read in evidence, if it clearly appear that he never resided on the land. *Hoak v. Long.* x. 9
30. By a conveyance of a mill, the whole right of water enjoyed by the grantor, as necessary to its use, passes along with it, as its necessary incident. And the grantor cannot, by a conveyance of another lot of ground through which the stream passes, impair the right to the use of the water already vested in the first grantee. *Strickler v. Todd.* x. 63
31. If in such subsequent conveyance, a covenant be entered into by the grantee, not to use the water except as it had been used, *query*, Whether an action of covenant lies by the first grantee, as running with the land; but, at all events, case will lie against such subsequent grantee for obstructing the water. *Ibid.*
32. In a deed of bargain and sale, which states a money consideration, evidence is admissible to show, that besides the consideration of money, there was a consideration of advancement to the daughter of the bargainor.
- Query*, Whether parol evidence is admissible, to show a consideration contrary to that expressed in a deed of bargain and sale. *Hayden v. Mentzer.* x. 329
33. A. conveyed a tract of land of one hundred and forty acres, one hundred and thirty-six perches, to B., in fee; "excepting a small quantity, struck off the said tract at the west end by a conditional line." B. entered into possession of the whole, and his title and possession were transferred to several others, two of whom purchased for sheriff's sales of the whole tract, no notice being given, or claim made on the part of A. The conditional line was not marked on the ground, nor capable of being ascertained. A., twenty-three years afterwards, came on the ground, parted out his part to his vendee, who had twenty-one acres surveyed, and took a deed for them from A. Held, that A's vendee had no title to the twenty-one acres. *Stambaugh v. Hollabaugh.* x. 357
34. An exception of a "small quantity, struck off a tract by a conditional line," it seems is void for uncertainty, if there is no such conditional line ascertained, or capable of being ascertained. *Ibid.*
35. The omission to state, in a certificate of the acknowledgment of a deed, that the person before whom the acknowledgment was made, was a justice of the peace of the county in which the land was situated, does not render the certificate void. It may be supplied by parol proof, that he was an acting justice of the peace at the time the acknowledgment was taken. *Scott v. Gallagher.* xi. 347
36. A deed conveying all debts, dues, and demands, real, personal, or mixed, which are due, or owing, or

- of right belonging to the grantor, by virtue of inheritance, legacies, bonds, notes, book debts, or otherwise, to the grantee, and his heirs and assigns, passes real estate. *M'Williams v. Martin.* xii. 269
37. The vendee of a tract of land, to whom a deed has been executed, and who has given a bond and mortgage for the purchase money, is presumed, in the absence of evidence to the contrary, to have accepted the deed; and, in an action on the bond, he is not entitled to an abatement, on account of a small deficiency afterwards discovered in the quantity of land conveyed. *M'Dowell v. Cooper.* xiv. 296

DEFALCATION.

See EVIDENCE, 89. PAYMENT WITH LEAVE. PASSIM. PLEADING, 32, 33. PROMISSORY NOTE, 1, 2, 19. SET-OFF, PASSIM.

Where the assignee of a promissory note, drawn payable *without defalcation*, takes it with full notice of a right of defalcation, attended with circumstances of strong equity, arising between the drawer and payee subsequent to the date of the note, he takes it; (at least if the payee was insolvent at the time of the assignment,) subject to such right of defalcation. *Lighty v. Brenner.* xiv. 127

DEFICIENCY.

See DEED, 36. PURCHASE MONEY, 1, 2, 3.

DEMAND.

A demand of possession is waved, when the tenant, on being informed of the plaintiff's claim previously to bringing the ejectment, refuses recognition. *Youst v. Martin.* iii. 423

DEMURRER TO EVIDENCE.

1. On a demurrer to parol evidence, if the evidence be uncertain, or circumstantial, the party offering it may pray the court not to be compelled to join in the demurrer, unless every fact, which the evidence in any degree tends to prove, be confessed. *Duerhagen v. The United States Insurance Company.* ii. 185
2. So, if one fact tends to the induction of another, the last fact must also be admitted. ii. 185
3. If the judge, who tries the cause, errs in directing a joinder in demurrer, it is good cause for the court in

bank, to order a *venire facias de novo.* ii. 185

4. The court in bank, may, on the argument of the demurrer, make every inference of fact which the evidence warrants; or if upon consideration of the record, they should be of opinion, that there are not sufficient facts to warrant a judgment, they may order a *venire de novo.* ii. 185
5. On a demurrer to evidence, every fact is taken *firo confesso*, which the jury might, with the least degree of propriety, have inferred from the evidence. *Schreider v. Putnam.* iii. 413
6. The court are not bound to compel a party to join in a demurrer to evidence, consisting partly of written, and partly of parol proofs, unless the party demurring, concedes all the facts which the evidence has a tendency to prove. *Lessee of Maus v. Montgomery et al.* xi. 329

DEPOSIT.

See AGENT, 2, 3, 4.

DEPOSITION.

See EVIDENCE, PASSIM. NOTICE, 5. WITNESS, PASSIM.

1. Notice was given by the plaintiff, of taking a deposition. The plaintiff attended; the defendant did not. Several adjournments took place, and the deposition was taken in the absence of the defendant, and without notice to him. *Held*, irregular. *Hamilton v. Menor.* ii. 70
2. Though a deposition is taken, by the consent of the parties, expressed in the strongest terms, yet it remains open to all legal exceptions; unless the contrary is declared. *Burke v. Lessee of Young.* ii. 383
3. Where a deposition was taken, under a rule of court for taking depositions, on reasonable notice; a notice on the 11th, of taking a deposition on the 13th, was *held*, to be too short in the country. *Hamilton v. M'Guire.* ii. 478
4. A deposition taken on a commission, was entitled, in a suit by the plaintiff against the defendant and another, who had not been summoned, and did not appear, and the defendant filed cross interrogatories; *held*, that it was a mere clerical mistake, and that this court would consider it, as if it had been amended below. *Purviance v. Dryden.* iii. 402

5. A deposition taken in a former suit between the same parties, may be given in evidence where a witness is living, and out of the state. *Carpenter v. Groff*. v. 162
6. Where there was no rule of court, or settled practice, as to the number of days' notice of taking a deposition under a rule; and it was uncertain whether the rule for taking the deposition was not entered by order of the court, and many years had elapsed, and no objection made, it was *held*, to be admissible; it being on six days' notice, and the parties living near each other. *Ibid*.
7. It seems if the adverse party thought the time too short, he should have moved the court, at the next term, to have suppressed the deposition. *Ibid*.
8. A rule to take depositions, implies, without being so expressed in it, that they are to be taken before a judge, or justice of the peace. *Keller v. Nutz*. v. 246
9. It is not permitted to a party, on a bill of exceptions, to object, that it does not appear by the record, that the notice of taking depositions was served at the time stipulated in the rule, if the witness was not interrogated below on that point, and the objection to the deposition below, was on another ground. *Ibid*.
10. To get rid of such objection, the court would presume the date of the notice was the day of service. *Ibid*.
11. Where a rule of court requires notice of taking a deposition, to be given to the opposite party, notice to his attorney is not sufficient. *Nash v. Gilkeson*. v. 352
12. A deposition taken by a commissioner, appointed by the defendants, (no person appearing on behalf of the plaintiff,) is not evidence, if it appear that the witness had not answered one of the defendants' interrogatories, and had been examined, and had answered generally to the cross interrogatories, or that only a part of the cross interrogatories, filed by the plaintiff, were put and answered. *Withers v. Gillespey*. vii. 10
13. A deposition, not taken according to the rules of the court, is not evidence. *Rambler v. Tryon*. vii. 90
14. If the notice be, that depositions will be taken at a certain house in the borough of Lancaster, and all that appears is, that the deposition was taken in the county of Lancaster, it cannot be read in evidence, if taken in the absence of the opposite party, but the appearance of the adverse party cures every defect in notice. *Selin v. Snyder*. vii. 166
15. When a rule of court authorizes a rule for taking depositions, to be entered of course, stipulating reasonable notice, the construction of the rule must, so far as respects the necessity of specifying the number of days' notice in the rule, depend on the usage and practice of the court. *McConnel v. McCoy*. vii. 223.—*Cunningham v. Irwin*. 247 S.P.
16. Notice of the taking of a deposition, served on the attorney in the cause, is good, unless he objects at the time of service. *Newlin v. Newlin*. viii. 41
17. It is not essential, that the time and place of taking a deposition, should appear on the face of it; it lies on the party objecting to show the irregularity; and if nothing of the kind was attempted in the court below, it is not admissible in a court of error. *Ibid*.
18. It is no objection to a deposition, that it was not entitled, or expressed to have been taken under a rule of court, if it be annexed to a certified copy of the rule of court, under which it was taken. *Vincent v. The Lessee of Huff*. vii. 381
19. Where there is a rule of court, forbidding a deposition to be read, if the witness lives within forty miles of the court, unless he be sick or unable to attend, a deposition of a witness who lives within the county, taken under a rule of court, by the plaintiff, who does not choose to make use of it, cannot be read by the defendant, if the witness has been subpoenaed by neither party, and there is no proof that he is sick or unable to attend. *Gordon and Walker v. Little*. viii. 533
20. If too late to object at the trial, to an answer in a deposition, on the ground that the interrogatory is a leading one. It should be objected to, when put. *Sticker v. Todd*. x. 63
21. It is not an objection to the reading a deposition in evidence, that when the party objecting, inquired for it before the trial of the prothonotary, he answered, it was not returned, though it appears it was then in the possession of the opposite counsel, who had taken it out of the office; but it seems it would be a

good ground for a continuance of the cause. *Nussear v. Arnold*. xiii. 323

22. Generally speaking, the court below is to judge whether notice of the time and place of taking a deposition is proved. *Veris et al. v. Smith et ux.* xiii. 334

DEPUTY.

See EVIDENCE, 140.

A deputy clerk of the peace has power to administer the oath required by the act of the 29th of March, 1788, on the registry of a negro or mulatto servant. *Commonwealth v. Greason*. v. 333

DEPUTY SHERIFF.

See ESCAPE. EVIDENCE, 238.
SHERIFF.

DEPUTY SURVEYOR.

See EVIDENCE, 140, 143.

DESCENT.

One having made a small improvement on vacant land, without having made any settlement, or had any view to residence, died; and after his death, a warrant to include his improvement, was taken out by his brother, for the benefit of the daughter of the deceased, which was paid for with funds derived from her father. *Held*, that the estate did not come to her *ex parte paterna*, but was a new acquisition, which on her death would descend to her brother of the half blood, on the mother's side, in preference to more remote kindred of the whole blood. *Simpson v. Hall*. iv. 337

DESERTION.

See ENLISTMENT, 2. INFANT, 5.

DEVASTAVIT.

See EXECUTOR. EXECUTORS AND ADMINISTRATORS. JUSTICE, 35.

Voluntary payment by executors, to legatees, without a refunding bond, does not excuse them from the charge of *devastavit*, at the suit of a creditor. *Dougherty v. Snyder*. xv. 84

DEVISE.

See ACTION, 12. CONDITION, 2, EJECTMENT, 40. ELECTION. ESTATE FOR LIFE. EVIDENCE, 112, 113. FORMER RECOVERY, 2. LEGACY. RELEASE, 1, 2, 3, 8, 9. TENANT IN COMMON, 4. TESTATOR. WILL.

1. Testator devised in the following manner: "I give and bequeath to my son, J. H., one hundred and thirty-seven acres of land, adjoining, &c., provided he, my son J., lives and improves upon said land, and enjoys it; and if my son shall have a son of a legitimate issue, the said son shall enjoy the aforesaid land, at his father's decease; and that my said son, J., shall have no power to sell or dispose of said land by seal. "Testator then devised all his other real estate to three other sons, to be equally divided between them; and then directed, that if either of his sons, (naming them all,) should "die, leaving no issue, the surviving persons, or their issue, should have their equal parts of the deceased's part." J. H. entered on the land after the birth of his eldest son, J. L. H. and suffered a common recovery, to the use of himself, in fee. *Held*, that on the decease of J. H., J. L. H. was entitled to the land, to the exclusion of the other children of J. H. *Hoge v. Hoge*. i. 144
2. A devise of a "grist mill and appurtenances," carries with it what was actually used as an appurtenant by the testator, on his life time, or, if that cannot be discovered, by his devisee, soon after his death. If there is no evidence of either, the jury must decide what is necessary. *Blaine's Lessee v. Chambers*. i. 169
3. A devise of "fifty acres of the most adjacent woodland thereunto next adjoining," does not carry with it three acres not woodland, as an allowance of six per cent. for roads. i. 169
4. Under a devise of that kind, in 1756, it might be left to the jury to decide whether it should, by the custom of the country, be included. But at this time of day, in a long settled country, it carries but fifty acres, strict measure. i. 169
5. If an estate be *devised* to one by his father or paternal grandfather, and he die, leaving neither widow nor lawful issue, nor father, but leaving a mother, the mother is not entitled to enjoy the estate during her life, under the 7th section of the intestate law of the 19th of April, 1794. *Shippen v. Izard et ux*. i. 222
6. A devise of a plantation "equally to my brother A's. eldest son and his heirs, and to my brother D's. eldest son and his heirs, jointly to be enjoyed by them, their heirs, and as-

signs, for ever," makes a tenancy in common. *Evans v. Brittain.*

iii. 135

7. A devised to his daughter B., during her natural life, for her sole use and behoof, and at her decease, unto her male heir C., if alive, at her death, to him, and to his heirs, forever; otherwise unto her next male heir, unto him and to his heirs and assigns for ever; and further directed, that whosoever shall live to come unto the estate of her male heir, shall three years after possession of said estate pay unto the other heirs of the said B., 200 pounds to be equally divided amongst them. *Held*, that B. took an estate for life, with concurrent contingent remainders in fee, to C. or such person as, in the event of his death in the life time of B., should be her heir male. *Dunwoodie v. Read.*

iii. 435

8. A. devised to his daughter and grand-daughter, to hold to them, and the survivor of them, and to their lawful issue, for ever, share and share alike, in two equal shares, and if either died without leaving lawful issue, of their bodies, then to the survivor, and her lawful issue for ever, and if both die without leaving issue of their bodies then to his loving friend D. W. to hold to him his heirs and assigns for ever, and gave power to D. W., and his said daughter, to sell all his lands if they should judge it more advantageous for his said daughter and grand-daughter, to have the interest arising from the money got for the land, than to rent it, and directed the money arising from the sale thereof, to be put out at interest, and gave the interest thereof in the same manner as he gave the plantation in the foregoing part, that is to say, one half to his daughter and her issue, and to hold to the survivor of them, that have lawful issue, for ever, but if both his daughter and grand-daughter die without lawful issue, then he gave the money arising from the sale of his aforesaid lands and tenements to his loving friend, D. W. and to his heirs for ever: *Held*, that the daughter and grand-daughter were tenants in tail in possession, with vested cross remainders in tail to each and a vested remainder in D. W. *Clark v. Baker.*

iii. 470

9. The testator devised land to his son F. to have and to hold the same to him and his heirs and assigns for

ever, subject to the payment of 2300 pounds to his son P., in instalments, the last of which was 14 years from the death of the testator; he also gave various articles to his son F. and 25 pounds a year for her life to be paid by his son F. to his wife, charged on the land devised to him; he also gave to his wife a house and lot, and after her death to his sons P. and F. in fee. After that he provided, that in case his son F. shall die under age, or without lawful issue, then, and in that case he gave his son F's. share in his said whole estate, unto his said son P. and his heirs and assigns for ever; and in case his said son P. shall die, under the lawful age of 21 years, or without issue, then; and in that case, he gave and bequeathed his said son P's. share in his said whole estate, unto his said son F. and to his heirs and assigns for ever; in either case, the survivor to pay his daughter E., or her heirs the sum of 500 pounds, but to be taken out of one of the payments of his first mentioned plantation. By a codicil, he ordered, and particularly requested, and did not allow his said son F. to sell any part of the land until he arrived at the age of 30 years, and then he might do as he pleased. *Held*, that or, must be construed *and*, and that both the contingencies, a dying under 21, and a dying without issue, must occur to F. before the estate can pass to P. *Lessee of Hauer v. Sheetz, note.*

iii. 487

10. A testator devised his real estate to D. C. and R. T. in trust as to one equal half part for the use of his "old friend, companion, and house-keeper E. H. and as to the other half part for the use of his natural son, J. L.; the survivor of either to possess the whole of the said estate by will or otherwise." He afterwards, at different times added the following codicil. "I do make this codicil in alteration, and addition of the within, *viz.* One thing was omitted in the above recited testament, of mention made, (as was intended,) in case of no legitimate heirs of the bodies of the two legatees, or ere (either) one of them that after his or her decease, it should revert to the heirs of my sister, J. S. wife of G. S. to be equally divided between them as my next of kin, who have deserved of me by writing, &c. lately, the others being provided for."

- Second codicil. I do authorize and request my good friends, D. C. and R. T. on account of an unfortunate intoxication of my housekeeper since said will, that they will proportion her subsistence, which I wish and will to be not less than 12 pounds per annum, or more than 20 pounds paid quarterly, or upon good behaviour, and her remaining 10 or 12 miles out of Easton, and that she or any other person may be prevented from wasting my estate, as the reversion of the same is left to my sister J. S's. children, as per codicil of my former will." Third codicil. "I am willing to allow my housekeeper, E. H. one furnished room in the house I now occupy, during her natural life, and 20 pounds a year, paid monthly, if regained by her or her order; but no part of the property of said room or monthly allowance shall be disposed of by her, she being for the most part insane." Held, that E. H. and J. L. did not take cross remainders; but that on the death of E. H. without issue the moiety of the estate devised to her went immediately to the children of J. S. the testator's sister, to be equally divided between them in fee simple. *Simpson v. Coon.* iv. 368
11. "Devise." I order the place whereon I now dwell to my daughter S., she paying two-thirds of the value thereof to her two sisters S. and M., and the land I lately purchased of R. T. I give and bequeath to my daughter B. to be inherited by her and her heirs lawfully begotten of her body; and if either of my said children die without issue, that then the inheritance is to descend to the next elder, dividing the value equally amongst the survivors, or the lawful heirs of them; all my said land to descend to the lawful heirs from generation to generation. S. took an estate tail. *Gause v. Wiley.* iv. 509
12. A posthumous grandchild *en ventre sa mere* at the time of making the will and death of the testator, is entitled to a grandchild's share under a devise and bequest to the testator's "grandchildren, the children of his son A. deceased," of all the remainder and residue of his estate, both real and personal, whatsoever and wheresoever to be found. *Swift v. Duffield.* v. 38
13. A devise of the testator's *property* will carry real estate. *Rossetter v. Simmons.* vi. 452
14. After declaring, in an introductory cause, his intention of bequeathing "what worldly estate it had pleased God to bestow upon him," a testator devised to his wife the benefit and full privilege of the plantation he then lived on, until his son should arrive at the age of 21 years, and if his wife remained a widow until his son was of age, she was to have half of his plantation, with all the benefit of it during her life or widowhood. He then devised to his son "the plantation and land he lived on as soon as he should arrive at the age of 21 years, if his wife should then be married or dead, but if she continued his widow, each to enjoy half as above." Then came a bequest to his two daughters, of the residue of his personal estate, to be equally divided between them, "and if either of them be removed by death before they be of age, the other to enjoy the whole; or if my son G. S. be removed by death before he be of age, his part to fall to my daughters." The son took a fee. *Cassell v. Cooke.* viii. 268
15. A devise of a lot with a house upon it to A. as his own property, and of certain specific legacies, of which he was not to be master till his full age, and in case he died before lawful age, or after such age without issue, then all and singular the above legacies, or what shall be left thereof, to be sold and divided among other children, carries a fee simple in the lot and house. *Stoevers v. Stoevers.* ix. 434
16. Where a testator orders his land to be divided among several persons, in a particular manner, they take under the will when the division is completed, notwithstanding they execute mutual releases. *Leek v. Cowley.* x. 176
17. Devise of land and quit-rents to the testator's son A. during the term of his natural life, and that after the decease of A. the land and quit-rents should be equally divided to and amongst all the lawful issue of the said A. or their legal representatives, share and share alike, and to their heirs and assigns. On the death of the testator, A. entered on the lands and suffered a common recovery to the use of himself in fee. Held, that A. took an estate for life with contingent remainders to the children of A. who were living at A's. death, and the children of such

- as were dead; and by comparison with other parts of the will, that such grand-children should take only their respective parent's share; and that the life estate of A. being forfeited by the recovery, the remainders fell for want of support. *Abbot v. Jenkins.* x. 296
18. Testator devised to his son E. C. two tracts of land, to hold to him and his assigns for and during the term of his natural life, he making no waste or destruction of the timber thereupon, and paying the testator's daughter 20 pounds within two years after his wife's decease; and from and immediately after the decease of E. C. he gave one tract to his two sons J. and D. their heirs and assigns as tenants in common; and the other tract to the heirs male of the body of E. C. lawfully begotten, and the heirs and assigns of such heirs or heir male for ever, and for want of such heirs male then to the two sons of J. and D. in fee as tenants in common. E. C. suffered a common recovery. *Held*, that by virtue of this devise E. C. took an estate tail in the second tract which was barred by the recovery. *Carter v. M^cMichael.* x. 429
19. Devise of real and personal estate to testator's wife during life and after her death, "to be divided between her's and my poor relations equally." The real estate is to be divided in the same manner as the personal estate. *M^cNeillidge et al. v. Barclay.* xi. 103
20. Testator devised to his only child one half of his estate real and personal, and directed his executors to put it out at interest during her life, and pay the proceeds to her, with power to dispose of the principal by will. "The rest or remaining part," he gave to his brothers and sisters. *Held*, that the child took one half of the clear estate without deduction on account of debts, which were to be considered as paid out of the residuary part devised to his brothers and sisters. *Shaw v. M^cCameron et al. Administrators of Scott.* xi. 253
21. On the death of the executors, intestate, the trust does not rest in the administrator of the surviving executor, but the child, being an unmarried woman is entitled to the immediate possession of the fund. It seems that where the *cestui que trust* is a *feme covert*, her husband would not be permitted to touch the fund, without securing it to her precisely as it stood in the hands of the trustees. *Ibid.*
22. A devise "as touching such worldly estate wherewith it hath pleased God to bless me in this life, I give and dispose of the same in the following manner and form: First, I give and bequeath to F. M. D. my dearly beloved wife, whom I likewise make my sole executrix of this my last will and testament, all and singular my lands, messuages, and tenements, in *Westmoreland* county, to be by her freely possessed and enjoyed," passes a fee simple. *Campbell et ux. v. Carson et al.* xii. 54
23. Devise to my son G., his heirs and assigns, to his and their only proper use and behoof for ever, provided always nevertheless, that if the wife of my said son G., to wit, A., should happen to survive him my said son, then and in such case the said premises above described, shall be and remain to and for the only proper use and behoof of the heirs or issue lawfully begotten on the body of the said A., [and of the children lawfully begotten on any other woman,] and their heirs and assigns for ever, as tenants in common, and not as joint-tenants; and for want of such issue, the same shall enure to the issue lawfully begotten on the body of my daughter C., intermarried with G. W., and their heirs and assigns, tenants as aforesaid," and, of another part of his estate, "to my daughter Catherine, and to her children lawfully begotten on the body of my said daughter C., and their heirs and assigns for ever." G. takes in fee, subject to the limitation over to his children, on the event of A., his wife, surviving him, and his children take as tenants in common by purchase. *Nebinger v. Upp.* xiii. 65
24. Devise to R. and his heirs, after the death of the testator's wife, "and in case my son R. depart this life before he is of age, or without lawful issue, I order and direct that my son W., and his heirs, may have the plantation that is by this will devised to his brother Robert, W. first paying, or or otherwise satisfying the legatees herein named, the sum of 1500 pounds *Pennsylvania* currency, viz. my sons, J., W., A., and G., and also my daughters, M., M., P., J., and B., or their heirs, shares alike; and in case my son W. will not accept the plantation aforesaid, under the

- condition above mentioned, in that case my son G. may have it, subject to the same terms as above mentioned, and on the refusal of G. to take the same, it shall be sold by my executors, for the best price that can be had, and the money arising from the same, divided, as before mentioned: it is also to be considered as my will, if any of my daughters, P., J., and B., or my son, A., depart this life before they are of age, or without lawful issue, in that case, the share or shares of the deceased to be equally divided between the survivors of my daughters, P., J., and B., also my sons, A. and R., and their heirs." *Held*, that R. having attained the age of twenty-one, the fee simple vested indefeasibly in him. *Welsh v. Elliott.* xiii. 205
25. The testator authorized his executors to sell as much of his real estate as should be necessary to pay his debts, and educate his minor children; and further recited in his will, that his son had purchased an estate, on which the testator had advanced part of the purchase money, and the son had given his bond and mortgage for the residue, and declared the trust of the land to the testator; he then ordered his executors to pay off the said bond and mortgage: *Held*, that the executors had power to sell the real estate of the testator, free from the incumbrances of his debts, and the purchaser was not bound to see to the application of the purchase money. *Grant v. Hook.* xiii. 259
26. Testator, after specific bequests of personal property to his widow, devised certain portions of his real estate to his six sons, and gave money legacies to his two daughters, charging his real and personal estate blended with the payment of debts and legacies. One of the sons died in the lifetime of the father, who died intestate, as to the portion devised to that son; and also as to a tract of land purchased after the execution of the will a large balance of the purchase money for which tract, remained unpaid at the time of his death. *Held*, that the assets were to be administered in the following manner, viz:
1. The specific bequest to the widow to remain untouched.
 2. The personal estate to be applied to the payment of legacies, and all the debts of the testator.
 3. To the balance remaining, after exhausting the personal estate, the descended lands are to be applied. If these funds should not be sufficient, then
 4. The lands devised are to be applied. *Commonwealth v. Sheeley.* xiii. 348
 27. Evidence that a testator, by whose will legacies are charged upon his real and personal estate, left considerable personal estate, is admissible to raise a presumption that the legacies have been paid. *Fuhrman v. Loudon.* xiii. 386
 28. Devise of residue to H. F. and others, and their children, their heirs and assigns in severalty, in the proportion of one-sixth to H. F. and her children, their heirs and assigns in severalty, in the proportion of one-sixth to H. F. and her children, their heirs and assigns for ever; the children of H. F. take immediately with their mother. *Graham v. Flower.* xiii. 439
 29. Devise to three daughters during their lives respectively, by metes and bounds. "Item, it is my will, that if any of my daughters die without lawful issue, or if having issue, and such issue all die in their minority, without leaving lawful issue, then I give the land and premises so to them before allotted, to my other child or children's lawful issue, as tenants in common, to hold to them, their heirs or assigns for ever." One daughter died before the testator; the others survived, and one of them married and had two children, and then with her husband conveyed an interest in the share of the deceased daughter, claiming to hold by the father's intestacy as to it. *Held*, that it passed no title. *Way et al. v. Gest et Ux.* xiv. 40.
 30. Testator, after a bequest of certain personal property, devised to his wife C., and his daughter A., and any other child or children he might have at the time of his decease, their heirs and assigns for ever, in equal shares, all his other estate and property, real and personal; and, in the event of the death of either, the share of the party dying, to go over to the survivor or survivors, in fee simple: but should his children, or either of them die without issue, such issue to stand in the place of his, her, or their deceased parent. He appointed his wife C. executrix, and J. W., Jr. executor, with power to sell the real

- estate. The testator left his widow C., his daughter A., and a son B., born after his death, who died in his infancy, leaving no issue. J. W., jr. alone proved the will, but both he and the executrix joined in the sale of the real estate, for which they jointly gave deeds, and received securities in their joint names for the part of the purchase money which remained unpaid. J. W., jr. had in his hands, as executor, personal property, money, or securities for money arising from the sale of the real estate, rents and profits received from the real estate, and interest or income of the personal property, and proceeds of the real estate. *Held*, that the widow, C., took an indefeasible estate in fee simple in one third; the children, A. and B., a defeasible one, and, upon the death of either of the children without issue, the estate went over to the survivor by way of executory devise, and consequently, on the death of B. without issue, the whole fee simple in the two thirds vested in A. And that the husband of the widow was entitled, in her right, to one third part of the proceeds of sale, and the guardian of the daughter to the other two thirds, and that where the money had not been received, they had a right to call upon the executor to proceed to recover the money due on the securities, or to assign them to the several plaintiffs, in proportion to their rights. *Lippincott v. Warder*. xv. 115
31. Testator left four thousand dollars "to my daughter M. B., to be placed out at interest upon good security by my executors, and the interest to be paid to her annually or oftener, as they shall receive the same during her life, and at her decease she may will it to any of my daughter's children as she pleases or sees fit; and in default of her making a will and so disposing of it, it is my will that the same shall be divided amongst her sister's children, share and share alike." In another clause, she bequeathed the interest of a like sum to the two sons of a deceased daughter, with cross-remainders to their issue, and she had then a daughter M. H., who had several children; M. B. afterwards made her will, and meaning to execute the power, gave one thousand dollars thereof to her great niece, E. S., and the remainder three thousand to her sister, M. H., if she should survive her, if not, then to her eldest son, S. E. H.
- Held*, 1. That the power was not well executed by M. B., either as to the one thousand dollars or three thousand dollars.
2. That in that event the whole money went to the children of M. H., and no part to the children of the deceased daughter. *Salter v. Howell*. xv. 188
32. Testator directs his executors to sell his real and personal estate, and that the interest of one half of the proceeds shall yearly and every year be paid by his executors to H. N., her heirs and assigns for ever, during her natural life; but in default of issue of the said H. N., the said moiety of the principal and interest shall descend to the next of kin, or heirs at common law, and their heirs and assigns for ever. *Held*, that H. N. took the moiety absolutely. *Train v. Fisher*. xv. 145
33. Devise to testator's wife of the rents, &c. of two houses, and so much of lands as should remain unsold after payment of debts, &c. for the maintenance, clothing, and education of his children, to hold to his said wife during her natural life, or until [whilst] she should remain his widow, said rents for the aforesaid, and for her own support: but if she should think fit to alter her condition by marrying again, then she gave to her 60 pounds per annum during her life, and in lieu of all dower out of said rents; and at the death of his wife, or upon her second marriage, to his said children, or the survivors of them, the said houses and lands, to be divided between them by his said wife equally, share and share alike, as soon as they, or either of them, arrive at 21; vesting full power in his wife at any time to order a division of the estate so devised to his children after her death or second marriage: *Held*, that the widow took an estate for life in trust for the purposes declared in the will, with a vested remainder to the children in fee as tenants in common. *Kinsey v. Lardner*. xv. 192

DEVISEE.

See ACTION, 7, 8.

DIMINUTION.

See CERTIORARI, 1.

DISCONTINUANCE.

Where an alderman enters a judgment in the absence of the plaintiff, and contrary to his wishes, he may on the same day, at the request of the plaintiff, strike out such judgment and enter a discontinuance. *Commonwealth v. Kite*, v. 399

DISORDERLY HOUSE.

See INDICTMENT, 2, 10.

DISSEISIN.

See LIMITATION, ACT OF, 8, 10, 11, 14, 16, 18, 25, 27.

1. A writ of entry *sur disseisin* may be maintained in *Pennsylvania*. *Witherow v. Keller*. xi. 217
2. But such an action is not to be encouraged, and in prosecuting it a party must pursue the strictest form. *Ibid.*
3. Therefore where the writ described the land as lying in *Greenwood* township without naming the county, and as containing 300 acres, and the declaration stated it to be *Greenwood* township in the county of M. and to contain 250 acres, held to be fatal on demurrer. *Ibid.*
4. If the *narr.* merely aver that the plaintiff was seised in his demesne as of fee and right, by taking the *explees*, &c. without any mention of the value, to which they were taken, it is bad on demurrer. *Ibid.*

DISTRESS.

See DAMAGES, 1. LANDLORD AND TENANT. LEASE, 3, 4, 5, 6. TRESPASS, 8.

1. *Query*, Whether the right of distress is incident to a lease on shares? If the landlord, to whom a share of the produce is reserved and due, substitute for it the promissory note of the tenant for a certain sum of money, he has no right to distrain for such money. *Warren v. Forney*. xiii. 52
2. The right to an action for an excessive distress, does not pass by an assignment under the insolvent debtors' act. The tenant, on whose premises the property of a stranger is seized for rent, is liable over to the stranger. *O'Donnel v. Seybert*. xiii. 54
3. A recovery of the surplus money, for which goods seized for rent sold beyond the amount of rent, is no evidence in a suit for an excessive distress. *Ibid.*
4. *Query*, Whether the landlord can distrain for rent reserved, payable

in advance, immediately on its becoming due by the terms of the lease. *Diller v. Roberts*. xiii. 60

5. It is a trespass by a landlord, to enter the house of a third person, to search for and distrain goods fraudulently removed by his tenant, if no goods of the tenant are found in such house.

A magistrate has jurisdiction of such trespass, where the damage claimed is less than one hundred dollars. *Hobbs v. Geisse*. xiii. 417

DISTRICT COURT.

See COMMON PLEAS, 1.

1. Where some of the counts of the declaration in assumpsit, were for damages sustained by the defendant selling to plaintiff an unsound horse for the sum of 80 dollars, and the verdict was for 40, held that the cause of action was not within the jurisdiction of the District Court for the city and county of *Philadelphia*, though these counts averred that the plaintiff had been put to expense in feeding and keeping the horse to the amount of 150 dollars. *Kline v. Wood*. ix. 294.
2. The District Court has not jurisdiction in case of contract where the value of the thing put in demand by the plaintiff's declaration is under 100 dollars. *Ibid.*
3. The District Court has not jurisdiction wherever the plaintiff could not recover costs if he had sued in the Common Pleas before the erection of the District Court, without having filed an affidavit. *Ibid.*
4. *Query*, What would be the criterion to determine the value of the matter in controversy in cases of contract, where the award of Arbitrators in an action in the District Court is under 100 dollars. *Ibid.*

DISTURBANCE.

The mere denial of a right does not constitute a disturbance of the exercise of that right. *Downing v. Baldwin*. i. 298

DIVORCE.

See CHILDREN. HUSBAND AND WIFE.

1. Where a proceeding was commenced, under the act of 1785, to obtain a divorce, from bed and board and alimony; and, pending the suit, that act was repealed, and the repealing act provided that cases pending should be finished under the repealing act; and by the repealing act, there was no divorce from bed

and board, or alimony, allowed, but a divorce, a *vinculo matrimonii*, was given for the same causes. *Held*, that the court might decree a divorce, a *vinculo*, but not a divorce from bed and board, or alimony. *Smith v. Smith.* iii. 248

2. A decree that the party should not have alimony; *held*, an imperfect decree, and sent back to the court to give a complete decree, or suffer the party to withdraw her petition. *Ibid.*
3. An appeal to the Supreme Court, lies from a decree for divorce, made by the Court of Common Pleas, in pursuance of a verdict. *Andrews v. Andrews.* v. 374
4. The Supreme Court will not, on such an appeal, re-try the matters of fact decided by the jury, in the court below. *Ibid.*
5. Upon a libel of the wife complaining of cruel and barbarous treatment, and praying a divorce from the bonds of matrimony, and an allowance of alimony, the court may, notwithstanding the informality of the petition, decree a divorce, from bed and board, with alimony, provided the libellant does not object to the decree. *Klingenger v. Klingenger.* vi. 187
6. An appeal lies, to the Supreme Court, on a decree of divorce from bed and board, and alimony, in the Court of Common Pleas, under the act of the 26th of February, 1817. *Robbarts v. Robbarts.* ix. 191

DOMESTIC ATTACHMENT.

See TRUSTEES, 2.

Though the real estate of an absconding husband has been seized, by the guardians of the poor, for the use of his wife and children, and the proceedings confirmed by the Quarter Sessions, yet trustees, afterwards appointed, in consequence of a domestic attachment issued against the husband, may recover such estate in ejectment, for the use of those creditors of the husband, whose claims existed previously to such seizure. *Thomas v. McCready.* v. 387

Query, whether such trustees could recover, where they represent creditors whose claims accrued after such seizure: or where the guardians of the poor had sold the property prior to the attachment. *Ibid.*

DONATION LAND.

See TAXES, 2.

In the year 1797, the tract of country called the *Struck District*, of dona-

tion land, was vacant, and open to settlement, under the act of the 3d April, 1792, for the sale of vacant lands within this commonwealth. *Varnum v. Kennedy.* vi. 155

DOWER.

See ELECTION, 7. EVIDENCE, 38, 111.

FORMER RECOVERY, 2. FRAUD, 2,

3. HUSBAND AND WIFE, 1, 2, 3, 10, 11, 12, &c. INTESTATE, 4, 5, 6.

LEGACY, 23.

1. In *Pennsylvania*, a woman is entitled to dower of a trust estate. *Shoemaker v. Walker.* ii. 554
2. A woman is not entitled to dower of an estate, the remainder of which, in fee, was vested in her husband, dependant on an estate for life in a third person, which remainder the husband had aliened during coverture. *Ibid.*
3. A wife is not barred of her dower by a conveyance, in which she joins with her husband, if she is not privately examined by the magistrate, who takes her acknowledgment. *Thompson v. Morrow.* v. 289
4. The widow, in the assignment of her dower against a purchaser, shall take no advantage of improvements of any kind made by the purchaser; but throwing those out of the estimate, she shall be endowed according to the value, at the time her dower shall be assigned to her. *Ibid.*
5. A female infant, in contemplation of marriage, with consent of her parent and guardian, gave her bond in consideration of five hundred dollars, to be paid to her by her husband's executors, and after his decease, engaging to release her dower in lands, of which he should die seized; and after the death of her husband, the five hundred dollars were paid to her, and she by deed, (being a minor,) released her dower to the heirs and representatives of her deceased husband, and the money was appropriated by her second husband to his own use. *Held*, to be no bar to her dower, and that she might recover in an action of dower, without refunding or tendering the money. *Shaw v. Boyd.* v. 309
6. It seems a deed by a guardian, specially conveying the interests of minors, does not transfer her own right of dower. Before assignment of dower, the widow's grantee cannot maintain ejectment. *Jones v. Hallopieter.* x. 326
7. If in a *scire facias* on a mortgage,

- the plaintiff admits by his replication, that the widow of the mortgagor is entitled to dower in the mortgaged premises, and judgment be entered generally for the plaintiff, it is to be understood to have been entered, subject to the widow's dower; the entry of the judgment on the docket, having reference to the other parts of the record. *Reidenhauer, Administrator of Smith, v. Kellinger.* xi. 119
8. But if under an execution, issued on such judgment, the land is levied and sold, without regard to the widow's dower, the execution is erroneous, and must be reversed. *Ibid.*
9. A widow may be endowed of an equity of redemption. *Reed v. Morrison.* xii. 18
10. If the husband, on the execution of a deed conveying land to him, execute a mortgage to secure the purchase money, he has such a seizure as will entitle his wife to dower, subject to the mortgage. *Ibid.*
11. But if the wife join with her husband in a power of attorney, which is not acknowledged by her in the manner directed by law, authorizing the sale of the husband's lands for the payment of his debts, and sales are made in the husband's lifetime, and after his death she calls the attorney to account for the proceeds of the sale, after the payment of debts, and the surplus is paid to her, or to her use, she is not entitled to dower. *Ibid.*
12. In dower, where the defence is, that previous to the marriage the lands had been given by the deceased to his son; held, that the declarations of the deceased that he had not so granted the land, are not admissible to rebut evidence of his declarations that he had: unless they were part of the same conversation given in evidence. *Galbraith et al. v. Green et ux.* xiii. 85
13. The fact of a release by such son of all his right to other lands of his father, in pursuance of an award in a suit against him by the other children and widow, is evidence,—but not a recital in it that the land was given to him by the father. *Ibid.*
14. Dower is maintainable in *Pennsylvania* for the wife's third in land, held by a person claiming by title adverse to his heirs, but supposed to have been the estate of the husband. *Ibid.*
15. A tenant for years, to whom notice is given on a writ of dower against several defendants, is not to be considered a defendant. *Ibid.*
16. On the plea of release of dower, in an action of dower, evidence is not admissible on the part of the defendant, of a recovery by the plaintiff against the husband's executors in covenant, on an agreement between the husband and wife previous to the marriage, by which he agreed in case they lived together ten years, to pay the wife four hundred dollars. *Barnet v. Barnet.* xv. 72
17. The wife's dower is not barred by a deed executed and acknowledged by her with her husband, if it does not appear in the certificate of the acknowledgment that the contents of the deed were made known to the wife of the justice, nor that she did in fact know them. *Ibid.*

DUCKING STOOL. See COMMON SCOLD.

DUELLING. See COSTS, 10.

EASEMENT.

A possession to prevent a recovery, or vest a right under the statute of limitations, must be actual, continued, adverse and exclusive. An easement, claimed out of the land of another, can never be subject to such limitation, for it is not constant, exclusive, and adverse: but a continued exclusive possession and enjoyment, with the knowledge and acquiescence of the inheritance, for twenty-one years, would be evidence from which a jury might presume a right to grant or otherwise, to such easement. *Cooper v. Smith.* ix. 26

EDUCATION.

Under the acts for the education of the poor of the first district, the controllers have a right to refuse to draw an order for the payment of a larger sum for the education of children in the seventh section, than is paid for the other sections of the district, though such sum be agreed to by the directors of such seventh district. *Commonwealth v. Controllers of Public Schools.* vii. 454

EJECTMENT.

See AWARD, 1. DEMAND, 1. EQUITY, 1, 2. ERROR, 10, 16, 107.

- EVIDENCE, 29, 39, 56, 95, 160, 363. EXECUTORS, 6. INSOLVENTS, 15. INTESTATE, 3, 4, 5. JUDGMENT, 37. LANDS, 1, 2, 7, 16. LIMITATIONS, ACT OF, 11. MORTGAGE, 12. ORPHANS' COURT, 21, 22, 23, 24, 27. PRACTICE, 21, 30. SCIRE FACIAS, 1, 13, 20. SETTLEMENT, 1, 2. TITLE, 1. VENDOR AND VENDEE, 8. WARRANT, 1, 2, 3, 4, 5, 6. WILL, 20. WITNESS, 18. WARRANT AND SURVEY, 18, 38, 39.
1. Payment of part of the purchase money for land, a survey, and taking possession, clearing and building a house by the purchaser, give a title, though the contract be by parol. *Smith v. Lessee of Patton*. i. 80
 2. Query, Whether the payment of a small part of the purchase money, unaccompanied by any other circumstance, be such a part performance as would authorize a decree of specific performance? i. 80
 3. It is a general rule, that where a contract has been made for the purchase of land, the purchaser shall not recover possession, till he has paid or tendered the purchase money. i. 80
 4. Query, Whether this must be done previous to the commencement of the ejectment. i. 80
 5. If the vendor be the executor of the vendee, and retains effects equivalent to the purchase money, such tender or payment need not be made. i. 80
 6. In an ejectment by A., for the use of the heirs of B., a deposition taken in a former ejectment by B. against the same defendant, for the same land, but in which the plaintiff claimed under a different title, cannot be read in evidence. *Cluggage v. Duncan*. i. 111
 7. When an application for land is entered, it is presumed to be for the use of him in whose name it stands. But it does not require very strong evidence to counteract this presumption. Superintending the survey, or paying the fees, has generally been deemed sufficient, unless rebutted by evidence, that the person superintending acted as agent, or unless possession, or some act of ownership, appear in favour of him in whose name the application is made. i. 111
 8. If the defendants who claimed under C., had proved that D. had made a verbal agreement to enter an application for the land in C's name, a location taken out by D., in his own name, would not enure to the defendants against the plaintiff, who purchased D's right for a valuable consideration, without notice of such agreement. i. 111
 9. If the defendant in ejectment set up the act of limitations, he must stand on his own possession, and cannot call in the possession of one whose title the plaintiff has purchased to assist him. A party may purchase as many titles as he pleases. i. 111
 10. If one have possession, by enclosure, of part of a tract of land, which has known boundaries, and at the same time claims the whole, this is a sufficient possession of the whole, and the act of limitations will operate in favour of the whole, if no other person have possession in fact or in law. But if another have possession of part of an adjoining tract, whose lines interfere, the law adjudges the possession of the unenclosed part to be in him who has the best right, and the act of limitations will have no effect, except as to the part actually enclosed. i. 111
 11. The plaintiff having discontinued a former ejectment, and having lain by, while valuable improvements were made on the land, are circumstances from which the jury may infer an abandonment of his claim. But if the delay be short, and no improvements be made, it is of little moment. i. 111
 12. It is no objection to the plaintiff's title, that the *fi fa*, or *venditioni exponas*, under which the land was condemned and sold to him, the plaintiff was named as executrix of *William M'Dowell*, instead of *William Dowell*. It is only a clerical error, which would be amended at any time. i. 111
 13. Abandonment of claim is not in all cases matter of fact; it may be a conclusion of law from facts. If a man make a settlement, and leave it for a great length of time, it will not avail him to say, that he keeps up his claim. Such verbal claims have no effect against the act of relinquishing possession, and in such case it is the right of the judge to declare the conclusion of law. i. 111
 14. In ejectment, the plaintiff claimed under an application of A., entered in 1767, under which a survey was

- made, but never returned. The defendant claimed under a warrant to B., issued and returned in 1766, and undertook to show, that A's. application had been surveyed in a different place. For this purpose he gave in evidence a return of survey by the deputy surveyor in 1807, who was sworn, and proved, that he had directed C. to make the survey. C. was sworn, and stated that he had received a letter from the deputy surveyor, directing him to make the survey, which letter was offered in evidence. The defendant stated in his opening, that he should prove, that the defendants were present and consented to the survey. *Held*, that the letter was evidence to show that C. acted by authority, but that the plaintiffs might take the court's opinion as to its having any effect upon their claim, unless their assent was proved. *Erwing et al. v. M'Knight*. i. 128
15. When one derives title under a warrant or application, he is estopped from carrying his title back further than the time fixed by the warrant or application, for the commencement of the calculation of interest. i. 128
16. Two verdicts and judgments, and seventeen years' acquiescence are not a bar to an ejectment. Nothing less than twenty-one years' possession is a bar. *White v. Kyle's Lessee*. i. 515
17. A defendant in ejectment, who makes title under the same survey as the plaintiff, cannot object that it was made on a shifting location, or say any thing against it. *Powers v. M'Ferran*. ii. 44
18. Where a lease is to expire at a time certain, a notice to quit is not necessary, in order to recover in ejectment. *Bedford v. M'Elherron*. ii. 49
19. But if the lessor allows the tenant to remain in possession seventeen years after the expiration of a lease, he cannot recover in ejectment without notice to quit. ii. 49
20. A naked possession is a good title to recover in ejectment against one who put the plaintiff out of possession, and can show no better title, but not against one who shows a better title. *Woods v. Lane*. ii. 53
21. Under the act of 23d of September 1794, it is necessary that a person should be residing on land at the time of application for a warrant. *Lane v. Reynard*. ii. 65
22. In ejectment a plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's. But a defendant cannot avail himself of this rule against a plaintiff whom he has fraudulently induced to purchase a weak title. ii. 65
23. A person in debt, and prosecuting an ejectment at the same time, may compromise with his adversary, provided the transaction is *bona fide*, and not tending to defraud creditors. *Richardson v. Lessee of Stewart*. ii. 84
24. Where, by the contract, possession was to be delivered before the payment of the purchase money, and was so delivered, it is not necessary to tender the balance of the purchase money, before commencing an ejectment. *Bosler v. Mesly*. ii. 352
25. After proving a warrant to A. a patent to B. may be given in evidence, without showing a conveyance from A., if it is stated that it will be followed by proof, that the defendant came into possession under the plaintiff's title, deduced from the patent. *Stewart v. Butler*. ii. 381
26. A *non. pros.* entered in ejectment, after a plea of not guilty, and a rule for trial or *non. pros.* is regular, though the plaintiff has not filed a description of the land, and issue has not been joined. It is the duty of the plaintiff, in such case, to file a description, join issue, and put the cause on the trial list. *Galloway v. Saunders*. ii. 405
27. In ejectment, the defendant's name will not be struck out, in order to substitute the landlord's, without the plaintiff's consent, but the landlord may be made a co-defendant. *Emlen v. Hoops*. iii. 130
28. *Query*, Whether a landlord of the defendant who has been active in defending the ejectment, but is no party to the record, can sue out a writ of error, and make the oath and give the security required by law. *Vanhorn v. Frick*. iii. 278
29. The plaintiff in ejectment, cannot recover on the weakness of the defendant's title; he must show title in himself. *Covert v. Irwin*. iii. 283
30. On a sale of unseated lands for taxes, if no tenant is on the land, the law will presume the purchaser for

- taxes, to be in possession; and if he will not appear and defend his title, judgment will be given against him. *Parish v. Stevens.* iii. 298
31. In ejectment, immediately on the plea of not guilty being put in, the cause is ready for trial, without any formal joining of the issue. *Gallagher v. M'Nutt.* iii. 409
32. No other plea than not guilty, can be pleaded in ejectment. *Ibid.*
33. The court will not, on motion for an order, that the sheriff perfect the title to lands sold by the late sheriff on a *venditioni exponas*, inquire, whether the judgment, on which the sale was founded, were unfairly obtained, but will leave that question to be tried in an ejectment by those who are interested in establishing the fraud. *Field v. Earle.* iv. 82
34. If a plaintiff in ejectment, in the form prescribed by the acts of the 21st of March, 1806, and 13th of April, 1807, convey the title pending the suit, he may nevertheless, proceed to recover damages and costs. *Murray v. Garretson.* iv. 130
35. A variance in the description between the writ and the statement filed, in an ejectment under the act of the 21st of March, 1806, is cured by verdict. *Thomas v. Culp.* iv. 271
36. What is a sufficient description of the land under that act. *Ibid.*
37. After issue joined in an action of ejectment, in the form prescribed by the act of the 21st of March, 1806, it is too late to plead, that in the description filed, the name of the township in which the land lies is omitted. This is a matter which should be pleaded in abatement. *Lyons v. Miller.* iv. 279
38. What is a sufficient description of the land agreeably to the act of the 21st of March, 1806. *Ibid.*
39. In *Pennsylvania*, that is to be considered as already done, which chancery would enforce the performance of: where, therefore, a plaintiff cannot enforce a specific execution of his contract against the defendant or those under whom he claims, he cannot recover in ejectment. He cannot recover without having paid or tendered the purchase money, before bringing suit. *Vincent v. The Lessee of Huff.* iv. 298
40. The Orphans' Court directed an issue in ejectment, in which A. B. was to be plaintiff, and C. D. and others defendants, in which the question to be decided should be, whether the plaintiff was entitled to recover under the deed from J. M. to the plaintiff; an amicable action of ejectment was entered in the Court of Common Pleas, in which the defendant pleaded the general issue, and there was a verdict for the plaintiff; but no declaration or description of the land was filed. *Held, erroneous. Wallace v. Elder.* v. 143
41. Acceptance of a lease for a small part of a tract of land does not estop the defendant in ejectment from controverting the plaintiff's title to the residue of the tract. *Pederick v. Searle.* v. 236
42. A continued adverse possession for 21 years gives a title to land, which is valid not only by way of defence, but sufficient to recover upon ejectment. *Ibid.*
43. It is no objection to such title that after the 21 years had expired, the premises were recovered against such party in ejectment. *Ibid.*
44. Nor is it material whether such recovery was by default, verdict, or confession. *Ibid.*
45. A settler on land east of the *Allegheny* river, who has defined the limits of his claim by marks upon the ground, may recover in ejectment without a survey. *Luck and wife v. Duff.* vi. 189
46. After a plaintiff has obtained judgment in ejectment for a moiety of land, he may sustain a new ejectment for the whole against the same parties, without taking possession, or suing out a writ of possession, or using any means to enforce the former judgment. But if a party after recovering in ejectment, harass the defendant by a new ejectment, when he is willing to surrender, such defendant might obtain relief on motion. *Rambler v. Tryon.* vii. 80
47. In ejectment, a description of the land claimed as two houses, one barn, eighty acres of arable land, twenty of woodland with the appurtenances in *Penn* township, *Northumberland* county, being part of a tract of land surveyed in pursuance of a warrant granted to W. G. is sufficient after verdict. *Fisher v. Larick.* vii. 99
48. Under the 3d section of the Act of the 13th of April, 1807, in case of the death of a party in ejectment, the person next in interest may be

- compelled to appear. *Darnes v. Welsh*. vii. 203
49. Where both the plaintiffs and defendants claim under the same right, the plaintiffs are not bound to trace back their title beyond the person holding that right. If there be an adverse right, it lies in the defendant to show it. *Riddle v. Murphy*. vii. 230
50. After articles for the sale of land, on which the vendor receives part of the purchase money in hand, and the residue is to be paid in several instalments, if the times of payment have long expired, without payment by the vendee, before or after the suit brought, the vendor may recover in ejectment. *Martin v. Wil-link*. vii. 297
51. If A. purchase the right of B. to land under an application and survey, he is answerable to the commonwealth for the purchase money, and is not bound to pay it till called upon; and if the representatives of B. obtain a patent, not at the request of A. nor for his benefit but for the purpose of vesting the title in themselves, A. may recover in ejectment against them, or those claiming under them, without previously tendering the money expended in procuring the patent. *Vincent v. The Lessee of Huff*. viii. 381
52. In an action of ejectment, to which the general issue is pleaded, it must appear that the defendant dispossessed the plaintiff or was in the actual possession of the land. *Cooper v. Smith*. ix. 26
53. The return of the sheriff under the act of assembly of April the 13th, 1807, is only *prima facie* evidence of the possession of any defendant, whether his name be in the writ of ejectment or be added by the sheriff, and such defendant may rebut it by showing that he was not in possession. *Ibid.*
54. Where the defendant in ejectment has only an equitable title to hold real estate till certain moneys are reimbursed, the plaintiff is entitled to recover if such moneys are reimbursed at the time of trial: but if the defendant has a legal title of that description the plaintiff cannot recover, unless the moneys were reimbursed at the institution of the ejectment. *Thomas v. Wright*. ix. 87
55. A contract that a person shall occupy a house and put it in repair, and in consideration thereof should enjoy the property at a certain rent till the repairs were reimbursed, makes such person a tenant from year to year, and not liable to ejectment when the contract is ended without notice to quit. *Ibid.*
56. The return of "served" by the sheriff, on a writ of ejectment, is *prima facie* evidence of possession by the defendants, whether they be originally named in the writ or added by the sheriff. *Deitrick v. Mathers*. x. 151
57. A verdict in ejectment, "that the defendant should have the third part of the 41 acres and 32 perches neat, and if any overplus, it goes to the plaintiff," is too uncertain; and it cannot be cured by the court's appointing a surveyor to designate the rights of the parties, and rendering judgment thereon. *Smith v. Jenks*. x. 153
58. In ejectment, if the lease laid in the narr has expired, the enlargement of it is amendment in matter of form, and it is error under the act of the 21st of March, 1806, if the court refuse it. *Maus's Lessee v. Montgomery*. x. 192
59. An action of trespass is a proper mode of recovering mesne profits after a recovery in ejectment, under the acts of the 21st of March, 1806, and 13th of April, 1807. *Osbourn v. Osbourn*. xi. 55
60. There is nothing in the action of ejectment by writ under these acts of assembly, which varies the consequences of a recovery from those of the common law, except where expressly declared by the legislature. *Ibid.*
61. It seems, that if the plaintiff does not seek to recover damages for a time anterior to the service of a writ of ejectment, the recovery in ejectment is conclusive, and estops the defendant; but if he does he must show his title, and the possession of the defendant. *Ibid.*
62. In an action of ejectment, in which the case turned upon the fairness of a sale under a decree of the Orphans' Court, held, that the defendant could not prove that the party under whom he claimed, declared at and just before the sale, at which he became the purchaser, that he intended to bid but a certain sum per acre for the land; but evidence that he offered immediately after the sale, to several persons to take them as partners in his purchase, at the

- same rate at which he bought, is admissible to show, that the land was not purchased below its value, and to rebut the suggestion, that he had purchased in collusion with one of the administrators of the intestate, whose property was sold. *Selim et al. v. Snyder et al.* xi. 319
63. The plaintiff, after the commencement of an ejectment, entered into articles of agreement with P., which recited the pendency of the suit, and that he had given to P. a power of attorney, to prosecute it to judgment, and then proceeded to state, that the plaintiff had agreed to grant, bargain, and sell, the land in controversy, to P., and his heirs; who was to prosecute the suit by virtue of the power of attorney, and if he should be successful, pay to the plaintiff \$2,000; and the plaintiff should then convey the land to him in fee, P. to bear the expenses of the suit; but if the plaintiff's title did not prevail, he was not to pay the 2,000 dollars, nor any part thereof. Held, that this was an executory agreement, which did not divest the title of the plaintiff. *Lessee of Maus v. Montgomery et al.* xi. 329
64. An application on which a survey had been made and returned, though the proprietor does not appear to have pursued his claim by entering upon the land, or occupying it, or paying the purchase money to the state or otherwise, except by bringing an ejectment, in which there was a verdict for the defendant, is a subsisting title in a third person, under which the defendant, in an ejectment, may protect himself. *Watson v. Gilday.* xi. 337
65. But if both parties claim by improvement, and the plaintiff prove a settlement of boundaries between the defendant and himself by agreement, the defendant cannot set up a title in a third person, to bar the plaintiff's recovery. *Ibid.*
66. A. and B., by articles of agreement, dated the 7th of September, 1794, sold certain lands to C., and covenanted to take out patents in his name; in consideration of which, C. covenanted to pay them a certain sum per acre; and to execute bonds, and a mortgage on these, or other lands of equal value, as a security. On the 17th of March, 1795, C., by deed, conveyed part of these lands to D., with covenants of special warranty, and for further assurance. On the 12th of July, 1795, E. who was interested in the concern with A. and B., and who had taken out the warrants and patents in his own name, conveyed the legal title to C., who, on the 14th of November following, executed bonds to A. B. and E., and a mortgage to A. and B. to secure these bonds and other debts. When the articles of agreement and conveyance to D. were executed, the lands were situated in the county of N., but when the conveyance from E. to C., and the bonds and mortgage were executed, they were situated in the county of L., which was taken from N., and erected into a county, the 13th of April, 1795. The deed from C. to D. was recorded in the county of N., the 17th of September, 1795. The deed from C. to E. was recorded in the county of L., the 18th of October, 1795, and the mortgage from C. to A. and B., on the 20th of the same month. A judgment was afterwards obtained on the mortgage, and the lands sold under a *levari facias*, to B. and E. Held, that the conveyance from C. to D. and the subsequent conveyance of the legal title from E. to C. did not vest in D. a title clear of the incumbrance of the mortgage, and that therefore C. was not entitled to recover in ejectment. *Chew v. Barnet.* xi. 389
67. An ejectment may be supported on a mortgage, before all the instalments become due. *Smith et al. surviving Executors, v. Shuler et al.* xii. 240
68. One ejectment may be maintained against several defendants, holding under separate titles, who may defend under their respective titles. *White et al. v. Lessee of Pickering et al.* xii. 435
69. If the declaration in ejectment, in the old form, by several plaintiffs, set forth a joint demise, and in making out their title it appears they are tenants in common, they cannot recover. *Ibid.*
70. If the plaintiff in ejectment, in whom the legal title is vested, in trust to prosecute the suit at the joint expense of himself and the other judgment creditors, to sell the property if recovered, and divide the proceeds rateably among the judgment creditors, make a general assignment for the benefit of his creditors, he is nevertheless entitled to 2 R

recover. *Thomfison v. Dougherty.*
xii. 448

71. A juror not interested in the ejectment to be tried, nor in any land, the title to which depends on the principles to be settled in it, is not liable to challenge for cause, on the ground that he is interested in another tract, held by the plaintiff under the same title, as that now in suit. *Gratz et al. v. Benner.* xiii. 110

72. Under the act of the 13th of April, 1807, section 2, the sheriff's return of, served in ejectment, is *prima facie* evidence, that the person on whom such service is made, is in possession, whether he be or be not the party named in the writ. *Ibid.*

72. Where the defendants in ejectment come into possession as tenants of the person as whose property the land in dispute was sold by the sheriff, under a judgment confessed by him, they cannot set up, as a defence, a mortgage and release of the equity of redemption, given to one of them by the defendant in the judgment. *Eisenhart v. Slaymaker.* xiv. 153

74. One verdict and judgment; and one award of arbitrators, under the act of the 20th of March, 1810, in favour of the same party, are not a bar to another ejectment by the other party. *Ives v. Leet.* xiv. 301

75. If the plaintiff in ejectment, claims both on an original title, and by virtue of a lease from him to the defendant, it is competent to the defendant to defend on both grounds; and it is error in the court to assume the existence of the lease, and prohibit the defendant from showing that the title is not in the plaintiff, but a third person. *Miller v. M'Brier.* xiv. 382

76. A tenant may impeach his landlord's title, whenever he can show that he was induced to take a lease by misrepresentation and fraud.

Ibid.

77. An agreement, by a person in possession of land, to abandon the premises at a certain day, is not a lease, and does not estop him from controverting the title of the person with whom the agreement was made. *Ibid.*

78. In ejectment, between the persons claiming under different locations, the defendant may give in evidence a lease made by his predecessor at a particular time, to show a pursuit of title and improvements made, and

known to the plaintiff before he purchased. *Maus' Lessee v. Montgomery.* xv. 221

ELECTION.

See CORPORATION, 4, 5, 6, 7, 11. EVIDENCE, 190. VOTING.

1. An inspector of an election may be voted for as a candidate. *Gibson, J. diss. Commonwealth v. Woolper.* iii. 29

2. Testator left sixteen children, and by his will directed that certain lands should be divided into five parts, and that "his sons, (except C.) may have their choice of said five tracts regularly in their turn, allowing the eldest to have the first choice, and so on till the said five pieces of land may be chosen." He then directed that one sixth part of the appraised value should be paid in one year from the time of the appraisement, by those who might then be of age to make choice, and the remainder in equal sums annually; but they who may not be then of age, *i. e.* twenty-one years, "I allow that their first payment be made at the age aforesaid, and if there should be any piece or pieces, not chosen as above directed, my will is that it or they be sold by my executors." *Held*, that the right of choice was not confined to the five eldest sons, but belonged to all the sons in turn. *Hoke v. Leman.* viii. 248

3. If the executors, by an authorized sale, have put it out of their power to give a son possession immediately on coming of age, he should be allowed a *reasonable time* afterwards to make his election. It seems that *one year is a reasonable time.* *Ibid.*

4. It seems also that the privilege of annulling a sale, improperly made by the executors, where none of the sons have made choice to take the land, descends to all the children of the testator, and that a son, who has omitted to elect at the proper time, may recover a child's share. *Ibid.*

5. The doctrine of election holds only where the remainders are inconsistent with each other, not where they are concurrent. *Patterson v. Swan.* ix. 16

6. Where a number are concurrently liable, they all remain so until satisfaction actually received from some of them. *Ibid.*

7. Bringing an action of dower, and counting therein, is such an election by the widow, as bars her claim of a

share of the surplus monies arising from land directed to be sold by executors to pay legacies, even if it were to be considered as undisposed of residue of personal estate. *Wilson v. Hamilton.* ix. 424

ENLISTMENT.

See INFANT, 4, 5.

1. An enlistment by a minor, without the knowledge or consent of his parent, is valid, if the parent give his consent, in writing, after the enlistment. *Commonwealth v. Camac.* i. 87

2. The enlistment of an infant is good at common law. There is no act of congress prohibiting the enlistment of a minor in the *marine corps*. Whether an enlistment be valid or not, one under arrest, upon a charge of desertion, must abide the sentence of a court martial, before he can contest the validity of the enlistment. *The Commonwealth v. Gamble.* xi. 93

ENTIRE CAUSE OF ACTION.

See APPROPRIATION, 3.

ENTRY.

1. Where an entry was made on land by a party, it is not error in the judge to leave it to the jury to decide, with what intent the entry was made. *Carothers v. The Lessee of Dunning.* iii. 373
2. The legal entry of one co-heir, or tenant in common, enures to the benefit of their co-heirs and co-tenants, not only so far as concerns themselves, but strangers. *Ibid.*
3. Before a grantee of a rent charge can enter for the non-payment of rent, he must make a demand of the precise amount due, and on the most notorious part of the land; although the possession be vacant, and there be nothing to distrain. *McCormick v. Connell.* vi. 151
4. Entering on land and making a survey, if done *animo clamandi*, may amount to entry and claim: but if the intent be doubtful; whether it is an entry and claim, is for the jury. *Miller v. Shaw.* vii. 129
4. A mere levy by the sheriff, and sale of one thousand acres, without mentioning the party's name, or that the land was in his possession, and without entry by the sheriff, are not sufficient to establish an entry on such party, by a person claiming under such sheriff's sale. *Ibid.*

EQUITABLE DEFENCE.

1. On the plea of payment, to debt on bond, with leave to give the special matter in evidence, the defendant after showing that the bond was for the purchase of a mill from the plaintiff, the dam of which overflowed the plaintiff's neighbour, which was known to the plaintiff, and that if the defendant should be obliged to lower it a certain depth, the value would be greatly reduced, may give in evidence the present value of the mill, compared with its value when purchased, and the rent it would now bring, compared with the rent at the time of sale. *Light et al. v. Stoever's Executors.* xii. 431
2. Such evidence is not by way of set-off, but as an equitable defence under the plea of payment. *Ibid.*

EQUITABLE SET-OFF.

1. On the 11th of *July*, 1817, P. & B. borrowed of the Insurance Company of *Pennsylvania*, 5000 dollars on *respondentia*, on a voyage to *Batavia*, and back to *Philadelphia*. The ship performed her voyage and returned to *Philadelphia* with a cargo of coffee, consigned to the President of the Company. On the 29th of *January*, 1818, B., without the knowledge of his partner, drew an order on the company to pay the proceeds of the shipment to K. and C., deducting the debt due on *respondentia* and the premium of insurance. On the 2d of *February*, 1818, the partnership of B. and P. was dissolved, and P. authorized to close the business of the house. About the 18th of *May*, 1818, P. entered into a negotiation with the President of the Company, when it was verbally agreed that the coffee should be delivered to P., he paying the *respondentia* debt and interest, and also ten shillings in the pound on three notes drawn by P. and B. and held by the company. On the 14th of *May*, 1818, P. (for P. and B.) assigned to S. all the interest of the house in the coffee, which was in the possession of the company. On the same day, P. tendered to the President of the Company the *respondentia* debt and interest, and also ten shillings in the pound on the said three notes; but the President refused to receive the money or to deliver the coffee, because the directors of the company refused to ratify his verbal agreement. On the

25th of *May*, 1818, S. (who was the son-in-law of P.) tendered to the President the *respondentia* debt and interest, but not the ten shillings in the pound on the three notes; but the money was refused. Some time afterwards, the company sold the coffee, by virtue of a power in the *respondentia* contract. The company brought suit on the three notes to *July Term*, 1818, in this Court. The case was arbitrated, and P. insisted, before the arbitrators, on the agreement to take ten shillings in the pound; and S. was examined to prove the tender made in pursuance of the agreement. The company demanded the full amount of the notes; but the arbitrators decided against them, and the company did not appeal. S., in his evidence before the arbitrators, did not mention the assignment of the coffee to him; nor did it appear, that at that time, the company had any notice of it. Unless it might be implied from the tender of the *respondentia* debt made by S., P. compromised the claim of K. and C. An action of trover was then commenced for the coffee, in the name of P. and B. against the company, which was originally marked for the use of P., but an entry was afterwards made on the docket, that it was for the use of S. *Held*, that under the circumstances of the case the defendants might, in equity, set off the judgment obtained against P. and B. on the three notes above-mentioned. *Passmore and another, for the use of Sparhawk, v. The Insurance Company of Pennsylvania.* viii. 66

2. It is a principle of equity, wherever the court finds mutual demands, to endeavour to set one off against the other; and Courts of Law in *Pennsylvania*, have adopted the doctrine of Courts of Chancery, with respect to equitable set-offs. *Morgan and Another, assignees of Wain v. The Bank of North America.* viii. 73
3. A stockholder who borrows money of a bank, with full knowledge of a usage not to permit a transfer of stock while the holder is indebted to the bank, is bound by such usage, and neither he nor his assignees under a voluntary general assignment, can maintain an action against the bank, for refusing to permit his stock to be transferred. *Ibid.*
4. *Quære*, Whether an action could

be maintained by a special assignee for a valuable consideration, without notice of the restriction? *Ibid.*

5. A. devised a fund to trustees, the interest of which they were directed to pay annually to his son, with authority if the interest should not be sufficient for his maintenance, to allow him so much of the principal as they should think proper. The trustees lent the whole fund to the son, and took his bond with one surety for the amount. The son afterwards took the benefit of the insolvent laws, and returned this yearly income as part of his estate. The assignees under the insolvent act, brought an action against the trustees under the will, to recover the arrears of interest, which had become due since the son's discharge; and it was *held* that the action could not be maintained: the circumstances of the case amounting to a good equitable defence. *Gochenauer and another v. Cooper and another.* viii. 187

EQUITABLE TITLE.

See CONDITION, 3.

The legal presumption is, that the equitable title to a warrant, is in the person who paid the purchase money; the person whose name has been used being merely a trustee for him who paid for the land: but this presumption may be rebutted by proof to the contrary. *Vanhorn and another v. Frick's Executor.* vii. 90

EQUITY.

See ACTION, 23. EVIDENCE, 134. LICENSE, 2. PROMISSORY NOTE, 1. VENDOR AND VENDEE, 10.

1. It is not the law of *Pennsylvania*, that by obtaining a patent and selling to a purchaser for a valuable consideration, all inquiry as to adverse claims founded on an equity arising previous to the patent, and of which the purchaser had no notice, is precluded. The title under the patent may be controverted by one who claims under an imperfect title, depending on a settlement, warrant, and location without patent, and then the question will be, to whom the patent will be granted by the land office. *Gonzalus et al. v. Hoover et al.* vi. 118
2. In *Pennsylvania*, ejectment is an equitable action, and wherever chancery would execute a trust or decree a conveyance, the courts of this state,

- with the instrumentality of a jury, will direct a recovery in ejectment. *Peebles v. Reading.* viii. 484
3. The court are the judges whether the plaintiff is entitled to relief, and of the extent and mode of relief: the jury are merely to ascertain the facts. *Ibid.*
 4. Of the equity powers of the courts of law in *Pennsylvania.* xi. 109
 5. The purchaser of an equitable title takes it subject to all the counter-vailing equities to which it was subject in the hands of the person from whom he purchased. *Chew v. Barnett et al.* xi. 389
 6. Equitable principles are to be applied by a jury, under the direction of the court, in the same manner as legal ones; and the remedy, on motion for a new trial, is the same. *Kuhn v. Nixon.* xv. 118

ERROR.

- See ADMINISTRATOR, 6. AMENDMENT, 3, 6. ARBITRATION, 35. ARBITRATION AND AWARD, 1. ASSUMPSIT, 29. AWARD, 18. BAIL, 8. BILL OF EXCEPTIONS, 7, 9, 10, 11. CONNECTICUT TITLE, 7. CORPORATION, 24. COURT, 5, 6, 7, 13, 15, 23. DECLARATION, 1. EJECTMENT, 73. EVIDENCE, 9, 185, 186, 189, 215, 312, 330, 350, 353. EXECUTORS, 5. IMPROVEMENT, 10. INDICTMENT, 18, 19, 30. ISSUE, 1, 2, 3. JUDGMENT, 9, 16, 25, 26, 33, 37. NOTICE, 3, 6. PLEADING, 11, 17, 18, 25, 28. PRACTICE, 2, 20, 21, 24, 25. PROMISSORY NOTE, 15. REFEREES, 1, 2. RECOGNIZANCE, 18. RESTITUTION, 1, 2, 3. SCIRE FACIAS, 9, 10, SET-OFF, 12, 25. WITNESS, 27, 42. WRIT OF ERROR.
1. It is not error if a judge state his opinion to the jury on a matter of fact, in which he is mistaken; but it is error to direct them erroneously in matter of law, so as to preclude their exercising their judgment. *Long v. Ramsay, executor of Long.* i. 72
 2. It is not an error that a writ of *venditioni exponas*, was not signed by the prothonotary. *McCormick v. Meason.* i. 92
 3. Nor that a *fieri facias* issued in order to found a *testatum*, was returned N. E. I. *Ibid.*
 4. Nor that in a suit against the executors the *fi. fa.* commanded the sheriff to levy on the property as executors. *Ibid.*
 5. On an appeal from a justice of the peace to the Common Pleas, if the promise be laid in the declaration after the entering of the appeal it is error. *Miller v. Ralston.* i. 309
 6. The court refused to award a *venire facias de novo*, because there was no error in the course of the trial. i. 309
 7. If the judge below has mistaken the evidence, and misled the jury by his remarks upon it, it is not such an error as this court will correct. *Graham v. Graham.* i. 330
 8. A party has a right to ask the opinion of the court on any point relevant to the issue, and a refusal to give it is error. In an action for continuing a nuisance, for the erection of which the plaintiff had formerly recovered damages against the defendant, the question "whether or not the former recovery is conclusive evidence of the cause of action contained in it?" is relevant to the issue. *Shaeffer v. Landis.* i. 449
 9. It is error in the court not to answer directly the question proposed by counsel. *Powers v. McFerran.* ii. 44
 10. It is error for the associate judges, in the absence of the president, to charge the jury that their opinion is not the opinion of the legal court nor did they give it as that of a court informed in points of law. *Richardson v. Lessee of Steward.* ii. 84
 11. No writ of error lies upon a judgment of the Common Pleas, in a case removed from before a justice of the peace to that court by a *certiorari.* *Cozens v. Dewees.* ii. 112
 12. A writ of error lies to remove the proceedings, in a case of attachment sued out against a vessel by virtue of the act of the 9th of February, 1793, which vested in the Common Pleas the powers previously belonging to the State Court of Admiralty, where judgment has been entered on the verdict of a jury in the form of a common law judgment. *The Ship Portland v. Lewis.* ii. 197
 13. Where the Court of Common Pleas first struck off an appeal from an award of arbitrators, and three days after reinstated it, *held* that no

- writ of error lay till final judgment. *Straub v. Smith.* ii. 382
14. Granting or refusing a new trial is not the subject of a writ of error. *Burke v. Lessee of Young.* ii. 383
15. A writ of error lies on a judgment arrested. *Benjamin v. Armstrong.* ii. 392
16. The defendant cannot assign as error that the writ of ejectment is not signed by the prothonotary, if it is under seal. This defect is cured by appearance, and pleading to issue, and by the act of assembly prescribing a writ of ejectment. *Ibid.*
17. It is not an error to charge the jury that the lines of an adjoining survey will not make a sufficient survey for the party, if the judge leave it to the jury whether there was a survey made or not. *Lilly v. Paschall's Executors.* ii. 394
18. A judgment is not to be reversed for error, because the judge, in his charge, has not made all the remarks the nature of the case admits of. *Ibid.*
19. The opinion of a judge, on matters of fact, is not error. *Renn v. Contributors to Pennsylvania Hospital.* ii. 413
20. If from the answer of the court the jury may be led to suppose that certain material points, which are matters of fact for the jury, are matters of law which they had no right to consider, it is error. *Work v. Lessee of M'Clay.* ii. 415
21. A writ of error does not lie on an indictment and sentence in forcible entry and detainer without a special allocatur. *Commonwealth v. Meyer.* ii. 453
22. Mistake, or want of accuracy, in expressing the opinion of a judge to the jury, on facts, is not error. *Poorman v. Smith's Executors.* ii. 464
23. Nor is an omission to charge the jury on a point of law to which the attention of the judge was not particularly called. But, misdirection of the jury, in matter of law is error. *Ibid.*
24. When the whole case is mixed of law and fact, the judge may leave the whole to the jury, unless the counsel select for his opinion some particular point. *Ibid.*
25. It is not error if the court, in giving judgment on a verdict, reserve the right to settle the precise amount due by referees to be chosen by consent of the parties. *Riddle v. Stevens.* ii. 537
26. Where proceedings have been confined in this court on error, and the record ordered to be sent back, it is to be considered as out of this court whether actually sent back or not. *M'Call v. Crousillat.* iii. 7
27. Even if still in this court the issue on *nul tiel record* would be with the plaintiff, where the declaration does not state it to be in the court below, but only that judgment was given in the court below. *Ibid.*
28. Writs of error ought not to be allowed in criminal cases, merely to reverse a judgment, where the merits have been fairly tried, and the defendant has suffered no wrong. *The Commonwealth v. Pennock.* iii. 199
29. A writ of error abates by the death of one of the plaintiffs in error, before errors assigned. *Boas v. Hies-ter.* iii. 271
30. A court of error will not minutely inquire into the time and order in which a witness is examined in the court below. *Salmon v. Rance.* iii. 311
31. It is error for the court to leave it to the jury to determine the construction of an award in writing. *Moor v. Miller.* iv. 279
32. If the Court on being requested, refuse to instruct the jury on a point of law it is error. *Vincent v. The Lessee of Huff.* iv. 298
33. If counsel request the court to instruct the jury on a material point, and the court omit to do so, it is error. *Humes v. M'Farlane.* iv. 427
34. If a point be placed fairly before the jury, and the court give an opinion on the facts in favour of one party, but give it merely as an opinion, and not as a direction binding on the jury, it is not error. *Porter v. M'Iroy.* iv. 436
35. An abuse of the discretion of a Court of Quarter Sessions in trying two indictments against the same defendant, when such trial was improper, would not be the subject of error. *Withers v. Commonwealth.* v. 59
36. Whether the court below were right in allowing execution to be issued is not the subject of a writ of error. *Nicholas v. Wolfberger.* v. 167
37. If it appear by the *narr*, that the suit was commenced before the justice, before the cause of action accrued, it is a fatal error. *Reed v. Collins.* v. 351

38. *A venire facias de novo* will not be granted where no error is shown in any thing that took place during the trial. *Ibid.*
39. Judgment having been entered on a bond and warrant, the parties agreed that the case should be proceeded in as if a feigned issue had been formed, and that the court should give judgment on the facts stated as if there had been a special verdict. The court below set aside the judgment. *Held*, that no writ of error lay. *Davis v. Barr.* v. 516
40. If the plaintiff's counsel ask a question of the Court which is answered, they cannot assign for error that the court charged on matter of fact. *McIlvaine v. McIlvaine.* vi. 559
41. A party cannot complain of the court's opinion in his favour. *ibid.*
42. The plaintiffs in error cannot complain of erroneous answers of the court if in their favour. *Collins v. Rush.* vii. 147
43. The plaintiff cannot assign for error a direction given by the court which was as favourable as his request. *Hubley v. Vanhorn.* vii. 185
44. When a judgment appears to be regularly entered by warrant of attorney, this court will not, on error, inquire into the validity of the bond, which the warrant accompanied, though it is sent up with the record. The party should apply to the court below to open the judgment. *Carlisle v. Woods.* vii. 207
45. The court will not reverse for an erroneous expression of the court's opinion on a fact, unless it clearly appear, that the jury were thereby precluded from deciding for themselves. *Riddle v. Murphy.* vii. 230
46. The admission of incompetent evidence cannot be assigned for error, when the fact it was adduced to prove, is afterwards established by other conclusive evidence. *Wolvertton v. The Commonwealth.* vii. 273
47. In an action against the sheriff and his sureties on their recognizance for a breach of duty in the sheriff's suffering a defendant to escape, after being in custody; if the plaintiff, after having giving notice to the defendant, to produce the execution, offer to prove the existence of the execution by parol evidence, and the defendant object to the evidence, on the ground that a record cannot be proved by parol evidence, and the court admit the evidence, and the defendant except to their opinion, he cannot afterwards in bringing a writ of error avail himself of the objection to the evidence that there was no proof that the execution had come to the sheriff's hands. *Ibid.*
48. Where the court below after a preliminary inquiry admit evidence of a writing alleged to be lost, it must be a strong case to induce this court to interfere in error. *Leazure v. Hillegas.* vii. 313
49. If the opinion of the court be requested on a certain point, and the court in answer, say the adverse party has given a certain answer to it, which is also stated, it is error. *Simpson v. Wray.* vii. 336
50. A writ of error lies to the judgment of the Court of Common Pleas, on the verdict of a jury rendered on appeal from an inquisition finding damages under the act of 8th of March, 1815, the proceedings on such appeal, being according to the course of the common law. *Schuylkill Navigation Company v. Thoburn.* vii. 411
51. In a suit brought into the Common pleas by appeal from the decision of an alderman or justice, if the declaration lay the assumption after the commencement of the suit before the magistrate, it is error. And the court will not send the record back to be amended by the Common Pleas. *Langer v. Parish.* viii. 134
52. A judge is not bound to give an opinion, as to the law, on the facts of the whole case; and if he do so, and direct the jury that their verdict should be for a particular party, it is error. *Jones v. Wildes.* viii. 150
53. If two be sued jointly, and both appear to the action, and an award of arbitrators be filed against both, from which one appeals, and the plaintiff afterwards joins issue with both, an execution against the one who did not enter the appeal, is erroneous. *Guhr and another v. Chambers.* viii. 157
54. If the court, after laying down the law correctly to the jury, add "These positions are all true as general positions. You are to decide how far they are applicable under the evidence in the cause," it is not error. *Cassel v. Cooke.* viii. 268
55. If a plaintiff call himself on the record, the *indorsee* of a single bill, it

- is not error. *Buck and another v. Nicholas.* viii. 316
56. If the court submit a cause to the jury, in such a manner as to lead them to suppose, that the principal fact is matter of law, which the court have decided, it is error. *Hershey v. Hershey.* viii. 333
57. To leave the construction of a deed to the jury, is error. *Vincent v. The Lessee of Huff.* viii. 381
58. Error cannot be assigned in a matter collateral to the action. Hence where, after a sale of lands under an execution, it was submitted to the court to decide, upon a statement of facts, whether the plaintiff in the action, or a judgment creditor, was entitled to the money brought by the sheriff into court, more than sufficient to pay the debt and costs, it was held, that the opinion of the Court of Common Pleas, was not subject to revision on a writ of error. *Irwin v. Gallagher.* viii. 528
59. No writ of error lies on an inquest finding a person to be a lunatic, returned to the Court of Common Pleas. *Case of John Gest, a Lunatic.* ix. 317
60. If a bill of exceptions state that the court permitted evidence to be given and then exception was taken, on error brought, it cannot be alleged that no such evidence was afterwards given. If the evidence had been withdrawn, that should be stated in the bill of exceptions. *Brindle v. M'Irvine.* ix. 74
61. After appearance to a writ of error and argument commenced, the want of an allocatur is no objection. *Eckart v. Wilson.* x. 44
62. The court will notice an error not assigned, which plainly appears, where the justice of the case requires it. *Anderson's Executors v. Long.* x. 55
63. If the opinion of the President of the court below is filed of record, with the reasons, the court above in error, are bound to notice it, though it do not appear to have been filed at the request of either party. *Brown v. Caldwell.* x. 114
64. A party cannot reverse a judgment, on an answer of the court below favourable to him, or on an answer to an abstract question. *Ibid.*
65. If on an appeal from a justice of the peace, the plaintiff's declaration or statement, lay a cause of action, which accrued subsequently to the commencement, of the suit before the justice, the judgment must be reversed on writ of error. *Roud v. Griffith.* xi. 130
66. Where facts have been given in evidence, according to the finding of which, the verdict will be decided, it is error in the court to instruct the jury, positively to find for either party; but where, admitting every fact and circumstance to be true, the plaintiff has entirely failed to make out his case, such instruction is not erroneous. *Weidler v. The Farmers' Bank of Lancaster.* xi. 134
67. If evidence be irrelevant at the time it is offered, it is not error to reject it, because other evidence might afterwards be given, in connexion with which it would become relevant. If it would be relevant in conjunction with other facts, it ought to be proposed in conjunction with those facts, and an offer to follow the evidence proposed, with proof of those facts at a proper time. *Ibid.*
68. If the record show merely that a verdict was returned in the court below, in favour of the plaintiff, and assessing damages, "*subject to the opinion of the court on the facts proved,*" and judgment on the verdict, *without more,* the judgment is erroneous and must be reversed. *Roberts v. Hopkins.* xi. 202
69. If the court, upon being requested to charge the jury upon the effect of a particular part of a deposition which cannot well be separated from the rest, in their instructions, take into view the whole of the deposition, it is not error. *Selin et al. v. Snyder et al.* xi. 319
70. If the charge of the court be so contradictory, that the jury must be at a loss to know what the law is, the judgment must be reversed for error. *Ibid.*
71. It cannot be assigned for error in this court, that the charge of the court below, was dictated; and drawn up by the counsel of one of the parties. *Ibid.*
72. Where the nature of the contract is submitted to the jury upon the whole evidence, an intimation of the opinion of the court as to its nature, though incorrect, is not error. *Harrier et al. v. Kean.* xi. 280
73. It is error to leave it to the jury to decide, whether an application, on which a surrender has been made

- and returned, has been abandoned. *Watson v. Gilday.* xi. 337
74. Where the hand writing of a deceased subscribing witness to a deed has been proved, the court has no right itself to examine witnesses, and on a belief that the instrument is forged, withdraw it from the jury. *Scott v. Gallagher.* xi. 347
75. Writ of error quashed, because the judgment in the court below was entered *pro forma*, and without prejudice to either party. *Kerr v. The Mayor, Aldermen, and Citizens of Pittsburg.* xi. 359
76. A party cannot assign that for error, from which he has sustained no injury. Therefore, if the court permit an improper question to be put to a witness, who is unable to give any answer to it, it cannot be assigned for error. *Allen et al. v. Rostain.* xi. 362
77. The party who put the question, has a right to have the answer of the witness placed upon the record. *Ibid.*
78. If counsel are of opinion, that their case may be taken out of a general rule of law, by any particular circumstances, they should propose those circumstances hypothetically, and ask the opinion of the court upon the law. If they omit to do so, they cannot assign for error, that the court in laying down a general rule of law correctly, have done so too broadly for the circumstances of the case. *Ibid.*
79. If the court, after instructing the jury as to the nature of partnerships, leave it to them to decide, from the evidence, whether one of the defendants had a right to bind the other in the contract in question, it is not error. *Ibid.*
80. Nor is it error to leave to the jury to infer an *acquiescence* in the contract by one of the defendants, where the evidence shows consent only *before*, and not *after* the contract. A judgment is not to be reversed on a verbal criticism. *Ibid.*
81. Error in the trial of an immaterial part of an issue, is no cause for the reversal of a judgment. *Edgar v. Boies.* xi. 445
82. Where, therefore, the plaintiff was bound by articles of agreement, to tender a conveyance on a certain day, OR to give security to make such a conveyance at a future day, and he has done the latter, it is a fulfilment of his contract; and if the court below, erroneously admit evidence to prove a tender of a deed on a day subsequent to that agreed upon, it cannot be assigned for error. *Ibid.*
83. The admission of incompetent evidence, which can prejudice no one, cannot be assigned for error. *Ibid.*
84. Where a question depends on a long correspondence, and a variety of circumstances, it is usual to submit its decision to the jury; and if the counsel on either side ask the opinion of the court, on matters of law and fact thus blended, the judgment cannot be reversed for error in that opinion. *Rouvert v. Patton.* xii. 253
85. Unless the facts, upon which an alleged error in the record depends, appear with certainty, the court will not reverse the judgment. *M^rFarland v. Commissioners of Mowmensing.* xii. 297
86. If the court assume a fact to be true, and then instruct the jury, that whether it be so or not, the law is the same, the judgment must be reversed, provided the charge be erroneous. *Armstrong et al. v. Hussey et al.* xii. 315
87. A judgment on an award against two, is erroneous, if one of the defendants only had notice of the rule of reference. *Ranck et al. v. Becker.* xii. 412
88. Entering security to obtain a stay of execution, is no waiver of the right to a writ of error. *Ibid.*
89. If it appear on the record, that the executor originally sued, was dismissed, and an administrator *de bonis non* substituted, against whom there are a verdict and judgment, such change of the defendant will, on error brought, be presumed to be by consent of parties, and the judgment is regular. *Fritz v. Evans.* xiii. 1
90. It is not error, that the judge who delivered and filed of record the opinion of the court, did not reduce to writing and file of record his reasons for the opinion, when requested by the party. *Morberger v. Hackenburg.* xiii. 26
91. After specification of errors, additional errors cannot be assigned, without leave of the court. Such leave will not be granted, where the errors are merely matters of form. Variance between the writ and count is not assignable for error, after verdict. *It seems*, the writ may be in debt on

- verbal promise, and the *narr.* in assumption. *Shenk v. Mingle.* xiii. 29
92. It is error in the judge not to answer a material question of law, which he is requested to do. *Peedan v. Hopkins.* xiii. 45
93. Additional errors not assignable after specification, on mere technical points. *Galbraith v. Green.* xiii. 85
94. The court are not bound to charge the jury whether taking all the evidence to be true, the plaintiff is entitled to recover. *Paul v. Duborow.* iii. 329
95. This court will not reverse a judgment entered by confession in the court below, in an action of debt, because no declaration has been filed. *Moyer v. Kirby.* xiv. 162
96. But where the suit is commenced by writ, an appearance entered, a plea put in, a judgment confessed, and the plaintiff, after judgment, by leave of the court, files a declaration, *nunc pro tunc*, the judgment will be reversed, if the declaration sets forth no cause of action. *Ibid.*
97. If, in a suit on a bond given to two persons as administrators, the instrument declared upon correspond with that given in evidence, but the declaration state it to have been assigned by both obligees, when in fact it appears to have been assigned by one only, this is not a variance for which the judgment will be reversed. *Wilson v. Irwin.* xiv. 176
98. This court will not reverse a judgment, except for error apparent on the record. *Munderbach v. Lutz's Administrator.* xiv. 220
99. If any presumption be admitted, it will be rather to support, than to reverse a judgment. *Ibid.*
100. The omission to instruct the jury on a point, which the verdict has rendered immaterial, is not error. *Ibid.*
101. It is not necessary for the court to answer a proposition submitted for their opinion in the very words of the proposition. It is enough, if the answer be sufficiently full to be understood. *Ibid.*
102. If a proposition submitted by the counsel to the court, be a mere repetition, in other words, of one which has already been answered, it is not error to refer to the answer already given, or even to omit to answer the proposition altogether; and if it be alleged, that the second proposition is different from the first, it is the duty of the counsel to place the first on the record. *Ibid.*
103. If the counsel of the defendant select that part of the testimony on which he relies, and request the court to instruct the jury that it is a full defence to the plaintiff's claim, and the court, who had previously stated the whole evidence in the case, in their charge, say, "The proposition is correct, and if the jury believe the facts on which it is founded, as stated before in the charge, it is a bar to the plaintiff's recovery," this cannot be assigned as error by the plaintiff. *Ibid.*
104. This court will not reverse a judgment, where a point is stated fairly by the court below, but not so fully as it might be stated. *Ibid.*
105. Nor will it reverse a judgment, because the court below has answered an abstract proposition, which this court may think ought to have been omitted; especially, if the answer be correct. *Ibid.*
106. If one of the several defendants enter a rule of arbitration for himself and his co-defendants, but without any authority from them appearing, and, upon an award against them, enter an appeal, representing himself in the same character, after which the cause is tried, and a verdict and judgment given against the defendants, this cannot be taken notice of by this court as error. The cause must be considered as legally in court, unless some one of the defendants should come and deny the right of appealing for him, and support his denial at least by his own affidavit. *Rush v. Good.* xiv. 226
107. If the record state that the court below instructed the jury as the plaintiff in error requested, without setting forth particularly what the instructions were, it is not error. *Bitzer's Executors v. Hahn.* 232
108. In ejectment, under the act of the 21st of March, 1806, judgment by default, at the first term, is irregular. *Vanderslice v. Garven.* xiv. 273
109. If to the proposition that parties are bound by their own construction of a contract at the time it is finally executed, the court answer, that the proposition is generally true, but that fraud is alleged, and, if found by the jury, the written evidence in relation to the contract is not conclusive, it is not error. *Frederick v. Campbell.* xiv. 293
110. In the following instructions to

the jury, *held*, that there was not error, viz. "If the warrant on which the plaintiff's survey was executed, was vague and indescriptive, it ought to have been returned in a reasonable time, or a sufficient reason given for the delay. Here is a survey on a loose warrant, not returned by the officer to whom it was directed, but, nearly ten years afterwards, certified by his successor, on the representation of the plaintiff himself, that there were no interfering claims, although, from his letter to Dr. *Smith*, he knew there were, and also knew that the land was settled upon by the present defendant. It appears, further, that he had relinquished his claim under the survey to Dr. *Smith*, and had declared to others he had no claim to any land on that side of the creek where that survey lies. If you believe all this, the survey ought not to attach, until actual return into the office; and, in that case, it gives no right to the land in question, if, as is the undisputed fact, the defendants had, six or seven years before the return and acceptance of the plaintiff's survey, entered upon the land as vacant, and, by actual residence and substantial improvements, acquired an equitable title. *Vickroy v. Shelley*. xiv. 372

111. Upon the following proposition, viz. "The survey of H. R., if a shifted survey, is to be considered as subsequent to the survey of R. I., not being returned before the *bona fide* survey of the plaintiff," the court below charged, "The survey on H. R.'s warrant, if a shifted warrant, (but of which there is no satisfactory evidence,) would give no title until actual return. But whether the plaintiff's warrant be, what the question pre-supposes, a *bona fide* one, and prosecuted with due diligence, is submitted to the jury on the evidence before them." *Held*, that in this charge there was no error. *Ibid*.

112. In considering the charge of the court below, a detached part of it is not to be taken, without reference to other parts, and to the facts proved in the cause; and if, from the whole charge, it appear that the court instructed the jury rightly in point of law, the judgment will not be reversed, even if the court below was mistaken in its opinion as to the facts. *Kerr v. Sharp*. xiv. 399

113. If, in an action on a bond with a condition, the defendant plead *non est factum* and performance of the condition, and, on the eve of trial, receive from the plaintiff, instead of a regular assignment of breaches, an informal specification of them, and go to trial on the merits, this amounts to an agreement of the parties to waive irregularities in the pleadings; and, consequently, this court will not reverse the judgment, because the cause was tried without having been regularly put to issue. *Barrington v. The Bank of Washington*. xiv. 405

114. It is error to leave to the jury the construction of writings. *Roth et al. v. Miller et al*. xv. 100

115. The general rule is, that if a person indebted to another on a note gives him a new note for the same sum, without new consideration, it shall not be deemed a satisfaction of the first, unless so accepted: but whether so accepted, is matter of fact for the jury, and it is error for the court to take the question from the jury, and decide it as matter of law. *Hart v. Boller*. xv. 162

ESCAPE.

See SHERIFF.

In a suit on a sheriff's recognizance against the sheriff and sureties, for his suffering a person in custody, under an execution, to escape, the insolvency of such person at the time is not evidence. *Wolverton v. The Commonwealth*. vii. 273

ESTATE.

See DEVISE, 10. WILL.

1. An estate held by warrant and survey, is a legal estate against all but the commonwealth, and may be entailed. *Duer v. Boyd*. i. 203

2. A., in consideration of natural love, and of six hundred pounds, executed a deed to B., and C. "his wife, who was the daughter of the grantor, "and to the children and heirs of the said C., and the heirs and assigns of such children; *Habendum* to the said B. and C. his wife, and to the children and heirs of the said C., to and for the proper use, benefit, and behoof of him, the said B., and C., his wife, during the term of their joint lives, and of the life of the survivor of them, and from, and immediately after the decease of the survivor of them, to and for the use, benefit, and behoof of the children,

and heirs of the body of the said C., lawfully begotten, their heirs and assigns for ever, in equal shares, as tenants in common, and not as joint tenants." At the time of the execution of the deed, C. had three children living. Afterwards several children and grand children were born. B. and C. take an estate for their lives, and the life of the survivor of them; with a vested remainder in fee, in the children born at the time of the execution of the deed, which opens for the purpose of letting in after born children, as their births respectively take place. The issue of such children as may have died during the lives of B. and C., or the life of the survivor of them, take the shares of their respective parents. *Wager v. Wager.* i. 374

3. A. conveys land to B., his son-in-law, in fee, subject to the following restrictions, viz: that B. is not to sell the same during the natural life of A.; but if A. sells his land, then B. is at liberty to sell and convey; and if B. should die before A., or before A. sells his land, then B. is to leave the same to his wife, or her lawful issue; but if A. should sell his land before the death of B., then B. may bequeath or sell the same, as he chooses. B. conveys the land by different conveyances, at different times, and A. dies before B. B's conveyances held good. *M^cWilliams v. Nisley.* ii. 507
4. The estate of B. is an unlimited estate, to which the doctrine of powers is not applicable. *Ibid.*
5. A general restriction of conveying after a grant, in fee, is void; but a partial one, such as to a particular person, or for a limited time, is good; and such time may be during the life of any person in existence, at the time of making the grant.

Query, Whether it can be for a longer time. *Ibid.*

ESTATE FOR LIFE.

Testator devised as follows: "As touching all my worldly substance, with which it has pleased God in this life to bless me, I give, bequeath, and dispose of the same as follows: *I make over* and bequeath to my son *George*, the plantation I now live on, *which hath two deeds.*" He then gave and bequeathed to his son *John* another plantation, and a third to two of his daughters, and to his other daughters he gave money

legacies. The personal estate he directed to be kept together, to maintain and school the children, as formerly, till *George* came of age, when it was to be divided into three parts, one of which was to go to his wife, and the other two to his two sons, *George* and *John*. And after *George* came of age, the testator's wife was to have such part of the house as she pleased, while she lived a widow. *Held*, that *George* took only an estate for life. *Steele v. Thompson.*

xiv. 84

ESTATE TAIL.

See COMMON RECOVERY, 2. DEVISE, 10, 11, 17.

1. A testator devises to his son, A., and the heirs of his body, and if he die without issue, to his daughter B., and the heirs of her body; and if both die without issue, "then the said real and remainder of my personal estate to be equally divided among my grandchildren, that shall then be alive, to hold to them and their heirs for ever." A. takes an estate tail. *Duer v. Boyd.* i. 203
2. If an estate tail charged with the payment of a legacy, be sold under an execution, for the purpose of raising the legacy, a fee simple passes to the purchaser. *Gauze v. Wiley.* iv. 509

ESTOPPEL.

See COVENANT, 5. PAROL SALE.

1. If a person conveys land to which he has no title, but afterwards acquires title, his heirs are estopped. *M^cWilliams v. Nisley.* ii. 507
2. A person under whose privity and by whose direction a Marshall's sale is made, is estopped from controverting the sale, so far as relates to any interest he possessed. *Willing v. Brown.* vii. 467
3. By accepting a deed conveying ground adjoining an alley and a court, together with the use of the alley in common with the grantor, "and his tenants and occupiers of the adjoining ground, *as also, of his* (the grantors,) *other ground bounding on the said court,*" the grantee is estopped from denying the right of way through the alley to the occupiers of ground adjoining the court, but not adjoining the alley; though at the time of the execution of the deed, the grantor had no right to grant a right of passage through the alley, as appurtenant to ground adjoining the court, but not the alley. And although the grantor and grantee

could not grant a right of way through the alley as appurtenant to any ground not adjoining it, without the consent of the owners of the land on the opposite side of the alley, yet the estoppel operates on one, who, with full notice on the face of his deed, purchases land on that side of the alley, of the grantee, who after the execution of the first mentioned deed, became the owner of the land on both sides of the alley. *Ewing v. Desilver*. viii. 92

EVIDENCE.

See ACCOUNT RENDER, 7. AGENT, 9, 10. AGREEMENT, 1, 2, 8, 10. ASSIGNEES, 7. BAILMENT, 2, 3. BANKS, 20, 21, 22. BILL OF EXCEPTIONS, 13. BILLS OF EXCHANGE, 7. CHECK, 2. CONNECTICUT TITLE, 10. CONSIDERATION, 2. CORPORATION, 12, 14. COURT, 12, 16, 17, 23, 29. DEED, 2, 3, 4, 21, 24. DEPOSITION. DOWER, 12. EJECTMENT, 6, 15, 25. EQUITABLE DEFENCE. EQUITABLE TITLE. ERROR, 47, 96. ESCAPE. EXECUTION, 28. FORGERY, 3. FORMER RECOVERY, 1, 2. FRAUD, 5, 10, 11, 13, 14, 16, 17. FRAUDULENT CONVEYANCE, 2. IMPROVEMENT, 2, 4, 8. IMPROVEMENT RIGHT, 1, 2. INFANT, 6, 7. INSOLVENT DEBTOR, 13. JUDGMENT, 31, 37, 49. JUSTICE OF THE PEACE, 13. LEADING QUESTION, 1. LEGACY, 5, 6, 7, 12, 13. LIEN OF MECHANICS, 15, 6. MONEY HAD AND RECEIVED, 4. MORTGAGE, 1, 8, 10. NEGRO AND MULATTO, 1, 2. NOTARY PUBLIC, 1, 2, 3. OFFICIAL BOND, 3. ORPHANS' COURT, 1, 14, 24. PAROL EVIDENCE. PARTNERSHIP, 1. PATENT, 1. PAYMENT, 1, 2 4. PAYMENT WITH LEAVE, 3, 4 5, 6, 7, 8. PLEADING, 19, 28, 31, 33, 34, 44. PRACTICE, 23. PROMISSORY NOTE, 4, 10, 11, 17, 20, 21. RASURE, 4, 2. REPLEVIN, 1, 5, 6, 14. SCIRE FACIAS, 1. SET-OFF, 3, 7, 12, 20, 26. SETTLEMENT, 1, 13. SLANDER, 2. SURVEY, 6, 7, 8,

9. TRUST, 1. USAGE, 1, 2. VENDOR AND VENDEE, 19. WARRANT AND SURVEY, 1, 2, 7, 9, 25, 26, 27. WARRANTY, 2, 4. WILL, 4, 5, 6, 7, 9, 10, 11, 12, 18, 20. WITNESS.

1. The declaration of a person who makes a lease, and in whose name the suit is brought for another's use, may be given in evidence by the lessee. *Johnson v. Kerr*. i. 25
2. A release cannot be given in evidence, without being pleaded. *Ibid*.
3. Parol evidence cannot be given of a fact, in relation to which there exists a contract in writing. *McKinley v. Leacock*. i. 27
4. An attorney, although he expects to receive a larger fee if his client recover, is a competent witness. The objection goes to his credit. *Miles v. O'Hara*. i. 32
5. An act of Assembly of Maryland, passed in 1752, to continue in force three years, and to the end of the next session thereafter, was given in evidence. It was also given in evidence, that this act was continued until 1766, and that an act was passed, in 1796, repealing it. *Held*, insufficient to prove that the act of 1752, was in force. *Wood v. Negro Stephen*. i. 175
6. If an instrument of writing be stated in a bill of exceptions to have been offered in evidence at the trial, and no objection appears to have been made to the proof of its execution, it is to be presumed to have been either duly proved or admitted. *Newlin's Executors v. Newlin*. i. 275
7. On an indictment for a disorderly house, a witness for the prosecution, after having stated several facts, tending to prove the offence, was asked "whether the house was not matter of general complaint by the neighbours, as disturbing them?" The question *held*, to be illegal. *Commonwealth v. Stewart*. i. 342
8. A cash account shown to the defendant, and not objected to, held to be evidence, upon which the jury, under the circumstances of the case, might decide. *Coe v. Hutton*. i. 398
9. If a transcript of a record, appear on the face to be irrelevant to the issue, it ought not to be read in evidence; but if no objection be made, it is not error, that the court below permitted the jury to judge of its correctness. *Ibid*.

10. When the original draft of a survey, found among the papers of a deceased surveyor, had no name inserted in it, a deposition, by a person who assisted in making the survey, that he believed a copy of the said draft was the copy of a draft made for the defendant, and delivered to him at the time of survey, cannot be given in evidence by the defendant, without producing the draft given to him, or accounting for its non-production. *Lessee of Packer v. Gonzalus.* i. 526
11. Such deposition not admissible to prove, that the surveyor told the deponent, at the time the survey was made, that the defendant lived on the land. *Ibid.*
12. Depositions before the board of property, are not evidence in a trial at law, even between the same parties. But an *ex parte* deposition, used before them by the adverse party, is admissible, if produced to take from the weight of their decision, by showing the sort of evidence on which they decided. *Ibid.*
13. Where a *caveat* had been entered, and continued against a third person having no title, but to whom a draft of survey had first been delivered, evidence may be given of his declarations, that he claimed the land in order to account for the *caveat*. *Ibid.*
14. The plaintiff read in evidence a deed, reciting, that possession of the land in dispute had been delivered to A., according to the contract. *Held*, that to rebut the presumption of outstanding title, he might show that A. admitted he had sold to another, who had sold to the plaintiff. *Ibid.*
15. After a person has parted with his interest, his declarations are not evidence to impeach the title derived from him; though adduced to corroborate what he had said before, or what was sworn by another witness. *Ibid.*
16. Parol evidence cannot be given of the contents of a libellous deposition sent to the governor, containing charges against an officer of his appointment, in an action for a libel, though the court has refused a *sub-jana duces tecum*. *Gray v. Pentland.* ii. 23
17. The governor, to whom such a deposition is addressed, must exercise his judgment, with respect to the propriety of producing the writing. *Ibid.*
18. Where the declaration states a promise by the defendant, to pay the plaintiff two bonds he has in his possession, executed by a third person, on the trial the bonds must be produced, or they must be proved to be lost or destroyed. *Query*, If, after a verdict, the court would presume that they were produced? *Dean v. McPherrin.* ii. 67
19. It is no objection to giving in evidence the declarations of a person deceased, proving a boundary, that an unavoidable implication arises from them, proving a survey. *Hamilton v. Menor.* ii. 70
20. A plaintiff in the suit, is not competent to prove the execution of a deed, to which he was a party with other persons. No person can be admitted to prove a deed, until it appear that the subscribing witnesses are dead, or not to be had. *Lessee of Peters v. Condeon.* ii. 80
21. A deed cannot be given in evidence, until some interest, either in law or equity, is shown to exist in the grantor. *Ibid.*
22. Where a witness is living, and within the jurisdiction of the court, evidence cannot be given of what he swore, in a former suit, between the parties. *Richardson v. Stewart's Lessee.* ii. 84
23. The deposition of a witness stated, that "the clerk of W. and C., came to the house of the plaintiff, P., and requested that P. would renew a certain note, and that P. agreed to renew it, to oblige them. *Held*, that it was not necessary to produce the clerk of W. and C. himself, to prove that he was sent by W. and C., but that as he was their agent, his sayings and doings might be proved. *Ship Portland v. Lewis.* ii. 197
24. The witness further stated that P. gave him a check, payable to W. and Co., with orders not to deliver it until he saw that the note had been discounted by the Bank of the United States. *Held* that the delivery of the check, and the giving of the orders, were one transaction, and that therefore the orders were admissible in evidence. *Ibid.*
25. Evidence of hand-writing of the obligor and witness to a bond is not admissible, where one of the witnesses is living in the state, though in a distant country. *Hautz v. Rough.* ii. 349.
26. A recital in a patent, of prior con-

- veyances, without other proof, is not evidence of the existence of such conveyances, against a person claiming under a title paramount, and who has had adverse possession. *Bell v. Lessee of Wetherill.* ii. 330
27. The confessions of a person under whom defendant claims are evidence of the contract against the defendant. A contract may be proved by circumstances, as well as by express proof. *Bassler v. Nicely.* ii. 352
28. A person who is disinterested may be a witness to prove a contract made by himself. *Smith v. Rutherford.* ii. 358
29. In ejectment for lands claimed under a will, it is no objection to giving in evidence papers relating to the lands, that part of the testator's interest had accrued after the making of the will. *Burke v. Lessee of Young.* ii. 383
30. The bond of a constable, taken under the acts of 1804 and 1810, and not acknowledged in court, cannot be read in evidence, without procuring the subscribing witness, if alive. *Petit v. M'Anam.* ii. 420
31. A patent is evidence to show that the commonwealth granted all its right to the persons under whom the plaintiff claims, notwithstanding it recites a conveyance to the patentees that does not otherwise appear. *Downing v. Gallagher.* ii. 455
32. It seems the rule that such recital is evidence only against persons claiming under the commonwealth, by title derived after the date of the patent does not apply to a defendant who shows no title. *Ibid.*
33. A deed dated the 25th of March, 1776, was acknowledged before I. C., who stiled himself "one of the justices of the Court of Common Pleas for the county of Bedford;" the acknowledgment bore no date, and stated that the subscriber acknowledged it. The land lay in the county of Bedford, afterwards *Huntingdon*, then *Cambria*. Held, that such deeds was properly rejected as evidence. *Ibid.*
34. Under the act of the 24th of March, 1791, a commissioners' deed on the sale of land for taxes, is not evidence, if it is not proved that ten days' notice was given of the sale in three or more of the most public places of the county in which the lands lie. *Blair v. Waggoner.* ii. 472
35. A declaration by a person under whom the plaintiff claimed land as heir, that he had sold and conveyed the land, and had no claim to it, means that he had conveyed it by writing; and cannot therefore be given in evidence by the defendant, without proving that the writing was lost. *M'Donald v. Campbell.* ii. 473
36. Query, If by other evidence it appear that a parol conveyance was meant, whether such conveyance is good without proof of possession, or payment of money? *Ibid.*
37. Proceedings in the Orphans' Court to sell land, cannot be given in evidence without proving title in the person, as whose property the land was sold. *Ibid.*
38. In an action of dower, cohabitation and reputation, especially of an ancient date, are good evidence to be left to the jury, to prove a marriage. *Chambers v. Dickson.* ii. 475
39. Where a power was given by will to several executors to sell, one of whom renounced, and another articulated to convey, and received the purchase money, and the vendee took possession, evidence of the prior and subsequent declarations of the acting executors, approving and ratifying the sale, is admissible, and such circumstances establish a parol title upon which the vendee may recover in ejectment. *Taylor v. Adams.* ii. 534
40. Evidence is also admissible in such case, to show a parol agreement by the testator with the vendee, to sell the land on the same terms on which the executor sold, though no money was then paid, nor possession delivered. *Ibid.*
41. But declarations made by the vendee in such case, on taking possession, are not admissible in his own favour. *Ibid.*
42. The proceedings of a presbytery against a minister are evidence to show his suspension or removal; but not the details stated in them. *Riddle v. Stevens.* ii. 537
43. Words used by one are not evidence against another, unless they are proved to be engaged in a common enterprise; but in such case they are evidence, though not conclusive. *Commonwealth v. Eberle.* iii. 9
44. What a witness, who has been examined for the commonwealth, has been heard to say as to the views and intentions of the prosecutors, is not evidence where he is not shown

- to be connected with the prosecutors, and the evidence is not offered to discredit him. *Ibid.*
45. *Query*, Whether it is evidence on any ground but that of discrediting the witness; as he might himself be examined as to such views and intentions. *Ibid.*
46. On the trial of a *quo warranto*, in which the issue is on the legality of the election, evidence may be given of conversations and transactions previous to the election, if they were connected with, and might have an influence on it, though no previous notice thereof has been given. *Commonwealth v. Woelfer.* iii. 29
47. The assent of the parties necessary to give validity to an assignment of an indenture of apprenticeship, must be certified by the justice, or at least expressed in writing before him, and attached to the instrument at the time of signing. Parol proof afterwards will not suffice. *Commonwealth v. Jones.* iii. 158
48. An entry of an appointment by the governor, made in the register kept by the secretary of the commonwealth, is good evidence of such appointment. *Moore v. Huston.* iii. 169
49. A class list and inspection roll, signed and affirmed by a captain, and returned by him, is good evidence when he has left his place of abode, and cannot be found after a diligent search. *Ibid.*
50. The plaintiff averred in his statement, that the single bill on which he claimed was assigned by himself, *John Adam Lautermilch*, executor of A. to B., who re-assigned to the plaintiff; on *non est factum*, a single bill agreeing in other respects with the statement, but assigned by *Adam Lautermilch*, "agreeably to the last will and testament of A.," (it being granted that the plaintiff was A's. executor,) is evidence to the jury to determine whether *Adam Lautermilch* and *John Adam Lautermilch* are the same person. *Lautermilch v. Kneagy.* iii. 202
51. Where one of the subscribing witnesses to a single bill, became afterwards assignee and plaintiff, and the other is the wife of the obligor, proof of the handwriting of the plaintiff is evidence without previous proof of the handwriting of the obligor. *Ibid.*
52. In a suit upon an award for damages done to the plaintiff's land, between the 10th of *August*, 1785, and the 4th of *August*, 1786, the defendant pleaded a former recovery, and gave in evidence a verdict and judgment between the same parties in trespass, brought by the plaintiff for the same kind of damage, stated in the declaration in the suit to have been done on the 10th of *August*, 1785, and continued from thence to the 3d of *November*, 1788: held, that the plaintiff might show by parol evidence, that the jury in that verdict, did not include the damages done during the time embraced in the award. *Haak v. Breidenbach.* iii. 204
53. The declarations of the obligor, (who has become insolvent,) made in the absence of the obligee, are not evidence in a feigned issue between creditors to try its validity. *Wolf v. Carothera.* iii. 240
54. Evidence is not admissible, to show that one of the devisees had by various discourses, intimated that he had procured the will to be made, and that it was read to him, and that he had given the reason why his brothers and sisters got so small a portion. *Miller v. Miller.* iii. 267
55. *Query*, Whether declarations by one of the devisees in a will, are evidence against the other devisees? *Ibid.*
56. In ejectment, evidence may be given to show that the plaintiff articulated to sell the land to a third person, and afterwards recovered from him in ejectment, for the purpose of showing a possession in the plaintiff. *Vanhorn v. Frick.* iii. 278
57. The declarations of a person, that he was authorized, by power of attorney from the plaintiff, to sell the land, are not evidence of such power; it should be produced, or its existence and loss proved. *Ibid.*
58. But they might be evidence to show that the plaintiff had acted such a part as to preclude him in equity from recovering the land. *Ibid.*
59. Parol evidence of a trial or judgment is improper; but it is admissible to prove payment after judgment. *Ibid.*
60. An offer by the defendant to compromise, not accepted by his adversary, is not evidence against him. *Slocum v. Perkins.* iii. 295
61. Letters written by the defendant's intestate to the plaintiff's intestate, and the plaintiff jointly, and to the plaintiff separately, which seemingly indicate a joint debt, but not con-

- clusively, are admissible in evidence in a suit for money paid by the plaintiff's intestate to the use of the defendant's intestate. *Ash v. Patton*. iii. 300
62. An entry in a private memorandum book, or docket of the sheriff, is not evidence that land was struck off to a particular person at a sheriff's sale. *Salmon v. Rance*. iii. 311
63. Evidence properly of a rebutting nature may be given in anticipation, if the court permit it. *Ibid*.
64. A person may testify to his knowledge of the general character for truth of a witness, which he has derived from common report. *Kimmel v. Kimmel*. iii. 336
65. The minutes of the board of property are not evidence of any fact, but what passes immediately before them. *Deal v. M'Cormick*. iii. 343
66. An acknowledgment of a payment of the purchase money in the body of a deed, and a receipt indorsed, are not conclusive evidence of such payment, nor a bar to a suit for the same. *Hamilton v. M'Guire*. iii. 355
67. When the narr. in covenant stated that the defendant, in consideration of one hundred pounds paid him by the plaintiff, covenanted to warrant certain lands, that the plaintiff paid the one hundred pounds, but the defendant had no title, *held*, that the plaintiff could not give in evidence a deed from him to the defendant, showing that the plaintiff had given for the land other land, and property of much greater value than one hundred pounds. *Clarke v. M'Anulty*. iii. 364
68. The decisions of the board of property are received in evidence, but are not conclusive as to law or fact. *Carothers v. Lessee of Dunning*. iii. 373
69. The plaintiff declared in covenant, on articles of agreement, by which he was to deliver a deed to the defendant on the 27th of May, 1812, which was then and there accepted by the defendant, but the defendant had not paid the money due on the 1st of May, 1813; *held*, that the time of making the deed was not material; and that the plaintiff could not give in evidence that he delivered a deed, dated the 3d of May, 1813, which was accepted by the defendant. *Cooper v. Jordan*. iii. 564
70. When the time of doing a thing is immaterial, evidence of doing it on a different day is admissible: otherwise when it is material. *Ibid*.
71. A book of original entries, verified by the oaths of the party, is good evidence to prove the sale and delivery of lime, and it is not necessary to fortify the book by the oath of the carters by whom the lime was received to be delivered. *Gurren v. Crawford*. iv. 3
72. If a book appear on inspection, or the examination of the party by the court, not to be a book of original entries, the court may reject it as incompetent. If this does not clearly appear, it must be submitted to the jury to decide on. *Ibid*.
73. In an action for the malicious abuse of legal process, the plaintiff may, in support of his declaration, give parol evidence of an agreement not to issue execution on a judgment, on a bond with warrant of attorney, without notice; but whether such an agreement is a good cause of action is another matter, of which the defendant may avail himself by demurrer, or by motion in arrest of judgment. *Somner v. Wilt*. iv. 19
74. On the trial of an indictment for selling spirituous liquors, without license in the city of *Philadelphia*, a taxable inhabitant of the city is a competent witness; but one who has been actually taxed is not competent. *Commonwealth v. Baird*. iv. 141
75. A certificate under the seal of the secretary of the land-office, that he had carefully searched for a certain warrant, and the same could not be found, is legal evidence. *Weidman v. Kohr*. iv. 874
76. The declarations of the person under whom the plaintiff derived his title, made during the time when he owned the land claimed by the plaintiff, that his warrant and survey did not cover the land in dispute, are evidence. *Ibid*.
77. Recitals in a patent are not evidence against a person claiming under the commonwealth by title prior to the patent. *Ibid*.
78. The notes taken by counsel, of the testimony of a deceased witness, supported merely by his oath, that he believes that he took down what the witness said as it fell from him, but has no recollection of what he said, except from his notes, cannot be received in evidence on a subsequent trial of the same cause to

- prove what the witness testified.
Lightner v. Wike. iv. 203
79. The declarations of a person who is named an executor and devisee, in a paper purporting to be a testament and last will, are not evidence in a suit to which he is a party, respecting the validity of such a paper as a will. *Ibid.*
80. Where the defendant gave evidence to prove communications of a very confidential nature, by a testator to a witness, it was held that evidence of declarations by the testator to another witness, tending to show that the first witness was not upon the terms of friendship and confidence with the testator which he pretended to be, was admissible. *Ibid.*
81. The record of proceedings before two justices and twelve freeholders, under the landlord and tenant law, is not conclusive evidence of the facts found by their inquisition; but the truth of them may be traversed in an ejectment brought by the tenant to try the title. *Galbraith v. Black.* iv. 207
82. In general, evidence is not admitted to contradict a record; but where issue is joined on a special declaration *in assumptit*, the plaintiff may give evidence in support of his case, though it may be inconsistent with the record of another action brought by him against the same defendant; but the effect of the evidence, when given, is to be decided by the court. *Hess v. Keeble.* iv. 246
83. In an action to recover compensation for services as a housekeeper, and for goods sold and delivered, evidence that the plaintiff was guilty of malfeasance in the execution of her trust, and embezzled the goods of the defendant, is not admissible by way of set-off; but it may be received under the plea of *non-assumptit* to defeat the action. *Heck v. Shener.* iv. 249
84. Recitals of the title in a patent from the warrantee, down to the patentee, are evidence against a defendant who relies on possession alone, and shows no title. *Whitmire v. Napier.* iv. 290
85. The probate of one of the witnesses to a deed certified by a judge, but not under his seal, is sufficient. *Ibid.*
86. The acts of a deputy surveyor, done in the course of his official duty, are evidence to show for whom he made a survey; but acts which are not official, are not admissible. *Vincent v. The Lessee of Huff.* iv. 298
87. A deposition taken under a rule of court without notice to the opposite party cannot be read in evidence, though a person having an interest in the subject of the dispute, attend, without authority, and cross-examine the witness. *Ibid.*
88. The docket entries of the prothonotary are not evidence of the issuing, service, and return of a writ. They are merely minutes of the officer; and the writ itself, with the return indorsed on it, should be produced. *Ibid.*
89. When a deposition is to be taken before a justice of the peace on the interrogatories, it is his duty to put the interrogatories separately to the witness, and obtain a distinct answer to each; and if the witness refuse to answer, he should certify that fact at the foot of the deposition. If these things be not done, the deposition cannot be read in evidence. *Ibid.*
90. If one party prove by evidence a witness to be interested, the witness cannot purge himself of the interest by his own oath. *Ibid.*
91. A release by a tenant in possession of all his interest in the land, will not make him a competent witness for his landlord; because he is interested in supporting the title under which he holds possession. Upon the same principle, evidence that the title is vested in another person, will not make him competent, because, if the plaintiff should recover, he is liable to be turned out of possession. *Ibid.*
92. In an action of debt on bond, it was held that under the plea of payment, with leave to give the special matter in evidence, the defendant might prove that the plaintiff had agreed, that certain monies to be paid by the defendant should be deducted from the amount of the bond, and that he had paid them without having given the notice of a special matter required by the 11th rule of the Court of Common Pleas of Columbia county. *Bryson v. Kerr.* iv. 308
93. If a witness reside out of the state, what he swore on a former trial between the same parties, where the same point was in issue, may be given in evidence. *Magill v. Kauffman.* iv. 317
94. The acts and declarations of trustees and agents of a congregation, in

- their official capacities, both before and after its incorporation, are evidence against those whom they represent. But their confessions, made not in the transaction of the business of their principal, are not evidence. *Ibid.*
95. A warrant was taken out and paid for by a father, in the name of his sons, and on ejectment brought, the question being whether the warrant was designed by the father as an advancement to his sons, or whether a trust resulted to him; it was decided, that evidence might be given of acts of ownership on the land by the father, and of declarations to explain those acts, in order to rebut the presumption that the land was intended as an advancement. *Sampson v. Sampson.* iv. 329
96. Where the question was, for which of two persons, bearing the same name, a warrant was designed; the court held, that a party might, to show for whom it was intended, give in evidence his own acts and declarations, down to the period of its date. *Sampson v. Hall.* iv. 337
97. Recitals of *mesme* conveyances in a patent, of an earlier date than the return of a survey, which has been protracted on paper, are evidence to show that the interest of the warrantee is vested in the patentee. *Diggs v. Downing.* iv. 348
98. The rule which precludes a man from giving evidence to destroy a paper, to which he has given credit by affixing his name, is confined to commercial negotiable instruments, *actually negotiable in the usual course of business.* *Baird v. Cochran.* iv. 397
99. In an action for a libel on the plaintiff, contained in an affidavit made by the defendant, and sent to the governor, relative to the plaintiff's official conduct, in an office held at the governor's will, the want of probable cause in the defendant, may be left to the jury as evidence of malice. *Gray v. Pentland.* iv. 420
100. The proof of the fact from which malice is to be inferred, lies on the plaintiff. *Ibid.*
101. Taking a warrant for, and having a survey made, but not returned, of a less quantity than a settler is entitled to, is not conclusive evidence of an intention to abandon the part not included; it is a circumstance which may be explained. Whether or not there has been an abandonment, is a fact which the jury from a view of the whole case, are to determine. *Porter v. McIlroy.* iv. 436
102. The draft of a deputy surveyor, is only *prima facie* evidence of the situation of an adjoining tract, for which it calls as a boundary. *Graham v. Moore.* iv. 467
103. The declarations of a party, that a contract was fair, are evidence, but not conclusive, that the transaction was not fraudulent. *Duncan v. McCulloch.* iv. 483
104. On the trial of a feigned issue of *devisavit vel non*, the declarations of a devisee, not a party to the suit, cannot be received in evidence to invalidate the instrument set up as a last will. *Bovard v. Wallace.* iv. 499
105. A witness, to refresh his memory, may, with the consent of the parties, read a copy of a deposition to which he has formerly sworn. But if the contents of a paper, purporting to be a copy of the former deposition, be copied into the deposition he is about to make, and he swear to it, without recollecting, at the time, all the matters contained in the former deposition, it cannot be received in evidence. But the answers of the witness to the questions put by either party, at the time of taking the last deposition, are evidence. *Ibid.*
106. Evidence is not to be considered secondary, unless it carries with it an indication that better remains behind. *Cutbush v. Gilbert.* iv. 551
107. Receipts by third persons, are not evidence to prove payments. The persons who gave the receipts should be produced. *Ibid.*
108. If, after the plaintiff has closed his evidence, without having made out such a case as will entitle him to recover, the defendant gives testimony, the plaintiff may give evidence to rebut that of the defendant, although, by so doing, he supplies the defects of his case, as originally proved. *Ibid.*
109. Transfers of an improvement right, accompanied by possession, exceeding thirty years, prove themselves. *Healy v. Moul.* v. 181
110. In slander, the defendant cannot give evidence to prove that he had been in the habit of relating the circumstances in a manner different, in some essential respects, from that charged in the declaration, though he has first proved that such rela-

- tion of the circumstances was true. *Willis v. Church.* v. 190
111. In an action on single bills, given for the purchase money of land, the plaintiff may give in evidence a release of an outstanding title of dower, bearing date after the commencement of the suit. *Hart v. The Executors of Porter.* v. 201
112. On the trial of an issue upon a will, impeached on the ground of an imbecility in the testator, and fraud and imposition of the principal devisee, after evidence given that the testator was under the control of that devisee, and that the cause of his displeasure against a son, whom he almost disinherited, was the supposed extravagance of his son's wife, and that the principal devisee had made representations to the deviser to that effect, held, that evidence of the general good character and conduct of the wife, was admissible. *Dietrick v. Dietrick.* v. 207
113. The certificate of the register of wills, that a will of lands had been duly proved, and approved before him, and a copy thereof was annexed, is *prima facie* evidence of such will, though a copy of the probate is not set out. *Logan v. Watts.* v. 212
114. In a suit between A. and B., the book of original entries of C. is not evidence to show a collateral fact, as that A. was charged by C., as partner in a certain house. *Juniata Bank v. Brown, jr.* v. 226
115. In a suit on a promissory note, under the plea of payment, the defendant claimed deductions, on the ground of fraud in the plaintiff, in an under estimate of the debts due by a partnership concern, for an interest in which the note was given. Held, that the plaintiff, to show that it was a mistake in the estimate and not fraud, may give evidence of the omission in such estimate, of property belonging to the partnership. *Ibid.*
116. A commissioner's deed, under their common seal, is no evidence of title; but it is an evidence for the purpose of showing that one, who was proved to have been in possession, held adversely to the plaintiff, in a case where the defendant relies on the statute of limitations as a defence. *McCoy v. The Trustees of Dickenson College.* v. 254
117. Where the defendant set up a possession of twenty-one years, under the act of limitations, and gives evidence of a possession by A., he may give evidence to show that A. held adversely to the plaintiff, though he has not previously proved the connection of his possession with his own. *Ibid.*
118. The declarations of a party, that he did not buy the lands in dispute, are evidence against him, but are not a positive bar in equity. *Swartz v. Moore.* v. 257
119. Notwithstanding evidence has been given on the part of the defendant, of declarations made by a person under whom the plaintiffs claim, it is not competent to the plaintiffs to give in evidence other declarations by the same person, on other occasions. *McPeak v. Hutchinson.* v. 295
120. It seems that the decree of the Orphans' Court, for the sale of lands, made at the instance of the vendee's children, is admissible on behalf of those claiming adversely to the vendor and vendee, to corroborate the declarations of the vendor, that he had sold to the vendee. *Ibid.*
121. A sheriff's deed is not evidence, without producing the judgment and execution. *Weyand v. Tipton.* v. 332
122. Where a husband agrees to convey land, but does not covenant that his wife shall join in the conveyance, her declarations that she never would execute a deed for the land, are not admissible in evidence, in a suit upon a bond, given to the husband in consideration of the sale of such land. *Brotherton v. Haslet.* v. 354
123. In assumpsit, for money had and received, the defendant cannot give evidence of his general character, though he is incidentally charged with committing a particular fraud. *Nash v. Gilkeson.* v. 352
124. If such evidence be admitted, the error is not cured, by the court's telling the jury, before the bill of exceptions is actually signed, that they ought to pay no regard to it. *Ibid.*
125. To prove a lost receipt, attested by a subscribing witness, the attesting witness must himself be produced, or the omission so to do must be supplied in the same manner as if the paper were produced.
126. Parol evidence is admissible in a suit by the indorsee against the indorser of a note, indorsed in blank, to show, that at the time of the in-

- dorsement, the indorsee received the note, under an agreement that he should not have recourse upon it to the indorser. *Hill v. Ely*. v. 363
127. The plaintiff may give in evidence, on non-assumpsit, that the plaintiff is an insolvent debtor, and that his property has been assigned to trustees, for the use of his creditors. *Kennedy v. Ferres*. v. 394
128. A book, kept by a forge master, for the purpose of settling with his workmen, in which are entered their names, the quantity of iron delivered, the date, and sometimes the price, is not such a book of original entries as is evidence against a purchaser of iron, though it contains also the names of purchasers. *Rogers v. Old*. v. 404
129. It seems parol evidence is admissible of what passed at the time of the execution of deeds, and to show fraud, mistake, or trust, or matters not inconsistent with the deed, but not to prove conversations between the parties, the day before the execution thereof, in order to vary their engagements. *Cozens v. Stevenson*. v. 421
130. Where the issue joined, was, whether the plaintiff had a patent right, dated the 17th of November, 1810, for "a steam still, and water boiler," evidence of a patent, dated the 16th of January, 1811, for "a water boiler, and steam still," is admissible. *Bellas v. Hays*. v. 427
131. A printed copy of the Irish statutes, with the oath of a barrister in Ireland, that he had received them of the king's printer in Ireland, and that they are good evidence there, are evidence to show the law of Ireland. *Jones v. Maffet*. v. 523
132. Whenever the issue is directly on the authenticity of an instrument, the court are bound, if there is the smallest evidence of its execution, to permit it to go to the jury, who are the only proper judges of the fact. *President, Managers, and Company of the Berks and Dauphin Turnpike Road v. Myers*. vi. 12
133. In trespass, for killing a dog, the plaintiff, to increase the damages, gave evidence of the qualities and value of the dog. It was held, that the plaintiff might, in order to reduce the damages, prove, under the general issue, that the dog was really of little value, and was addicted to worrying and killing sheep. *Lentz v. Stork*. vi. 34
134. Whatever will, in equity and conscience, preclude the recovery of the plaintiff, may in case, be given in evidence under the general issue. *Greenwalt and others v. Horner and others*. vi. 71
135. One who has conveyed land, subject to a right of way, with general warranty, is a competent witness for the defendant, in an action for disturbing the right, to prove an agreement for the removal of the road on a certain event. *Ibid*.
136. The whole of the proceedings, before the board of property, are admissible in evidence, in a court of law; but they are to be allowed no more weight than the court and jury think them entitled to; and if they appear to have been *ex parte*, they are to pay little regard to them. The facts recited in such proceedings, are not to be taken as *proved*, but the practice is, to suffer the whole to be read on trials at law. *White and another v. The Lessee of Kyle*. vi. 107
137. The rule which renders incompetent, a person whose evidence tends to impugn an instrument which he has sanctioned by his signature, though not interested in the event of the suit, is confined to instruments strictly negotiable, which have been actually negotiated in the usual course of mercantile business. *Hopburn v. Cassel*. vi. 113
138. An *ex parte* deposition before the board of property may be read to the jury by the party against whom the decision of the board is given in evidence, to show the grounds on which they proceeded. *Gonzalus and another v. Hoover and another*. vi. 118
139. An entry respecting the age of a child, in a book called the family bible, in the handwriting of the brother of the child; and supported by his oath, that by the direction of his deceased father, he copied that and other entries respecting the ages of the family, from another book in which the original entries were made in his father's handwriting, without accounting for the non-production of the book in which the original entries were made, is not evidence. *Curtis and another v. Patton and others*. vi. 135
140. The draft of a survey found in the office of the surveyor of the dis-

- strict, purporting to have been made by J. H., *for the proper deputy*, a survey returned thereon by the surveyor general, and a patent issued in pursuance of it, were held to be admissible in evidence, where it appeared that J. H., without a general deputation or a special authority to make the particular survey had, for many years been in the habit of making surveys for the surveyor of the district, who received his surveys, and returned them to the surveyor general as official acts. *Burd and another v. Seabold.* vi. 137
141. A paper signed by a clerk, stating that at some previous time, he had received certain goods, being more in the nature of a certificate than a receipt, is not evidence. *Glaser v. Ran.* vi. 206
142. The copy of a warrant, not under seal, sent by the surveyor general to the deputy surveyor of the district, with an order to execute the warrant, is evidence. *Motz v. Bolland.* vi. 210
143. Every paper found in the office of a deputy surveyor, is not to be deemed official; but all papers found among his office-papers may be fairly presumed to be official (unless the contrary appear) provided there were any orders in his hands, to the execution of which the papers in question might relate: where therefore a deputy surveyor had in his hands an application for 300 acres, and a warrant for 100 acres belonging to C. on which no surveys had been returned, a draft of 1492 acres, made by the deputy surveyor and found in his office, which did not appear to represent a survey on either the application or the warrant, but to be an outline of all the lands claimed by C., comprehending those claimed under the application and warrant, and noting the interferences of other rights, without mentioning the right under which the adverse party claimed, was held to be a proper paper to be submitted to the jury, who should give it such weight as in their judgment it might be entitled to. *Miller and another v. Carothers and others.* vi. 215
144. Where there were three subscribing witnesses to a will devising lands, one of whom only appeared before the register and proved the will in the usual form, after which he died, another of whom was a devisee and a party to the suit, and the third was dead and his hand-writing could not be proved, it was held that evidence might be given of the hand-writing of the testator, which, together with the oath of the witness before the register, was deemed sufficient proof of the execution of the will.
145. If evidence be offered in so vague and uncertain a manner, that it is impossible to know what it is intended to prove it ought to be rejected. *Duncan v. Findlay.* vi. 235
146. Under the plea of justification in an action for a libel charging the plaintiff with being a liar, the record of an action of slander in which the defendant and his wife were plaintiffs and the plaintiff defendant, for slanderous words spoken of the wife, to which the plea was, *not guilty* merely, and in which the jury found for the plaintiffs, cannot be given in evidence to prove the *falsehood* of the words spoken of the wife; but it seems that it might be received to prove the *speaking* of the words for which the suit was brought. *Maganran v. Patterson.* vi. 278
147. *Query*, Whether such a record would be inadmissible on the ground of being between different parties? *Ibid.*
148. A paper handed upon request to the opposite counsel, and inspected by him, does not in consequence thereof become evidence for both parties. *Farmers' and Mechanics' Bank v. Israel.* vi. 293
149. A letter of instruction written by the defendant to his supercargo, stating that A. who had purchased goods of the defendant, and shipped them by the same supercargo, had agreed that the return of his adventure should be addressed to him as a guarantee for the payment of the notes which A. was to give for the amount of the goods he had sold him, is not evidence in an action by the assignees of A. to prove such agreement, though A's. letter of instructions, touching his own goods, be previously given in evidence. *Jacoby and others v. Laussatt.* vi. 300
150. What is sufficient proof of the execution of a bond to entitle it to go to the jury. *Sigfried v. Levan.* vi. 308
151. The protest of a notary public under his official seal, certifying that he had given notice to the indorser of a promissory note of non-pay-

- ment by the drawer, is evidence of such notice; and if it appear from other evidence that the notice was not given by himself personally; and that he had no other knowledge of the fact than what he had derived from the person employed by him for the purpose, who told him that he had given the notice, the jury are to judge, from a view of the whole matter, whether notice has been given or not. *Stewart v. Allison.* vi. 324
152. In an action for an assault and battery, the plaintiff may in order to show the amount of the defendant's property, give in evidence the record of a judgment obtained against him by the defendant since the commencement of the suit; but for the purpose of showing a design in the defendant to oppress him, and that the defendant purchased his notes in order to obtain a judgment on them, and to set off that judgment against the judgment which the plaintiff might obtain, such evidence is inadmissible. *Jacoby v. Guier.* vi. 399
153. An *extract* from a lost letter cannot be given in evidence, though the witness by whom its correctness is offered to be proved, be ready to swear that there was nothing in the letter, relating to the matter in controversy, which was not contained in the extract, and this evidence is particularly exceptionable where no sufficient notice has been given to the party who wrote the letter, to produce his letter book containing a copy of it. *Dennis v. Barber and another.* vi. 420
154. The declarations of the recognisor, after he has conveyed the land to a third person are not evidence in the proceeding against such third person as terre tenant to show that the recognisor was or was not indebted. *Kean v. Ellmaker.* vii. 1
155. When books are produced on notice and entries are read in evidence, by the party calling for them, the party producing them may read other entries necessarily connected with the former entries, if made prior to the commencement of the suit. *Withers v. Gillespie.* vii. 10
156. It seems however that the rule is different, if the party merely inspect the books with a view to their being used. *Ibid.*
157. A declaration by a vendor evincing a disposition to defraud, is not evidence against him in a subsequent and distinct transaction with another person, not then in contemplation. *Share v. Anderson.* vii. 43
158. On the trial of the validity of a will impeached on the ground of imbecility of the testator from childhood to death, the opinion of other witnesses than those who attested the will, who knew him during that time, without stating any facts, is not admissible; but when they state facts as the ground of the opinion, it is good evidence. *Rambler v. Tryon.* vii. 90
159. In such case, the declarations of the supposed testator made in the absence of his wife, the devisee, of importunity used by his wife and his father-in-law to procure the will to be made, are evidence. *Ibid.*
160. Where witnesses on the trial of the validity of a will have given their opinion of the understanding of the testator, they cannot in cross examination be asked what their opinion would be on a different state of facts. *Ibid.*
161. The defendants in ejectment cannot give in evidence a record of a suit against a third person, on which the land was sold, to one under whom he claims, unless some colour of title be first shown in the person as whose property the land was sold. *Kennedy v. Bogart.* vii. 97
162. Parol evidence is not admissible to show that a scrivener in drawing a will inserted words of the meaning of which he was ignorant, in order to vary the effect of its dispositions, although it may be received to explain a latent ambiguity, or to rebut a resulting trust, or in case of fraud or mistake to annul the will. *Iddings v. Iddings.* vii. 111
163. It seems the rule allowing parol evidence in regard to written instruments, ought rather to be restrained than extended. *Ibid.*
164. But if a scrivener in his examination state, that the testator furnished him with the matter of the will, he may be asked on the cross examination what those instructions were; especially if the will be attacked on the ground of imbecility in the testator, and of undue means used to procure it; solely however with a view to those points; for if the testator was sound and free, the will must stand as it was written. *Ibid.*
165. After introductory evidence tending to show that a payment by a check was made as a loan to the

- payee, the bank book of the drawer, if the entries are duly proved, and with it the check itself, are evidence by way of corroboration; but a bank book is not evidence without proving the entries by the clerk of the bank who made them, unless it appears to be out of the power of the party to do so. *Patton's Administrators v. Ash.* vii. 116
166. A copy of a letter proved to be a true copy of an original, put in the post office, directed to the defendant's intestate, without notice to produce, the original, is not evidence. *Ibid.*
167. A letter dated the 24th of June, 1773, from a confidential clerk in the land office to the plaintiff's ancestor, showing title in the latter, accompanied with the original application and memorandum filed in the office, and afterwards ratified by the covenants of the parties, is evidence in favour of the plaintiff. *Foster v. Shaw.* vii. 156
168. Where the plaintiff's father, owning the moiety of a tract of land, devised the tract to the plaintiff and directed that the other moiety, the property of A. should be purchased at the expense of his other son J. in a suit for the moiety against persons claiming under A. a forged deed from A. to J. of all A's. right to the tract, no participation being shown by the plaintiff in the fraud, is not evidence for the defendant. *Ibid.*
169. The board of property has no authority to vacate a patent, and their minutes of *ex parte* proceedings for such purpose, are not evidence of any thing. *Ibid.*
170. The record of the Supreme Court of a suit between other parties, is evidence on behalf of the defendant as introductory to evidence to prove that a witness who was examined on the trial of that suit, and whose credit is impeached, gave the same evidence he had given in this suit. *Ibid.*
171. The notes of the judge who tried the cause, are not evidence to show what a witness swore for any purpose whatever. *Ibid.*
172. A deed, proved by one of the subscribing witnesses to have been executed in Ireland, and certified by the sovereign of Belfast, under the seal of the corporation, is not evidence, without proof that such seal is the seal of the corporation. *Ibid.*
173. Evidence of the improvements, made by the defendants, is admissible, in ejectment, to rebut the evidence of the same kind given by the plaintiff, though not otherwise correct. *Morris v. Travis.* vii. 220
174. In ejectment, by a person who purchased at a sheriff's sale, founded on a judgment in a *scire facias* suit, upon a mortgage, such mortgage is evidence, independently of the proceedings in the suit. *Allison v. Rankin.* vii. 269
175. When the plaintiff claims under a warrant and a survey, the defendant may give in evidence a patent from the commonwealth, containing recitals of title, without first showing that title. *Ibid.*
176. The transcript of a justice, not authenticated under seal, is not evidence. *Wolverton v. The Commonwealth.* vii. 273
177. The admission of incompetent evidence cannot be assigned for error, when the fact it was adduced to prove, is afterwards established by other conclusive evidence. *Ibid.*
178. A judgment in a *homine replegiando*, by the mother, in which she is decided to be free, is conclusive evidence against the defendant in such suit; who subsequently brings a *homine replegiando* against a third person, in which she claims the daughter of such former plaintiff as a servant, till twenty-eight, such daughter being born after the judgment, and her freedom, or obligation of service, depending on the freedom or slavery of her mother. *Alexander v. Stokely.* vii. 299
179. A receipt for the purchase money, indorsed on a deed, is only *prima facie* evidence, and may be rebutted by evidence. *Weigley's Administrators v. Weir.* vii. 309
180. A paper purporting to be an original survey, not returned to the office of the surveyor general, but found among the papers of a deceased deputy surveyor, in the hands of his executor, is evidence, if it be proved that the body of the writing, and the endorsements, were the hand-writing of several persons who had been deputy surveyors, or assistant deputy surveyors of the county. *Leazure v. Hillegas.* vii. 313
181. An exemplification, certified by the recorder of a county, of a deed, conveying lands, lying in that and another county, is evidence in a dispute concerning the latter. *Ibid.*
182. When the court below, after a

- preliminary inquiry, admit evidence of a writing, alleged to be lost, it must be a strong case to induce this court to interfere in error. *Ibid.*
183. A. holding a mortgage of C's land, agreed with B. that he would purchase the land at sheriff's sale, for B., at a certain price, to be paid him by B.; and by another agreement, that certain property, held by B., together with the mortgaged premises, should be applied to paying a debt due by C. to A., and if there were sufficient to do so, then the obligation of B., to pay for the premises to be purchased by A., should be void. A. purchased the lands at sheriff's sale: no deed was made to B., nor any application of the proceeds of the property to pay A's debt, and the agreements between the parties were mutually cancelled, and releases given; after which B. conveyed to D., a friend of B., and a person in necessitous circumstances. *Held*, in an ejectment by D., against persons claiming under A., that evidence is not admissible, to show that A. recovered his debt by proceedings against the property of C. *Blythe v. McClinton.* vii. 341
184. The testimony of a witness, that he had notice of the dissolution of a partnership, cannot be given in evidence, in a suit between others, in which the dissolution of the partnership, at that time, becomes a material question. *Shaffer v. Snyder.* vii. 503
185. If any evidence be given, tending to show that two defendants were concerned in the purchase of goods, it is not error to refuse to charge the jury, that the evidence proved an assumption by one only. *Wilmarsh and another v. Mountford and another.* viii. 124
186. If a deed of assignment be read in evidence without objection, on the trial in the court below, it cannot be urged in a court of error, that it was not recorded within thirty days from its date, as required by the act of the 24th of March, 1818. *Ibid.*
187. In an action for *crim. con.*, the declaration of the defendant, that he knew A. B. was married to the plaintiff, and that, with the full knowledge of that fact, he had seduced her affections, and debauched her, may be given in evidence in proof of the marriage. *Forney v. Hallacher.* viii. 159
188. In an action on a bond, given for the consideration money of a tract of land; whatever tends to prove fraud in the plaintiff, or want of title to the land, may be given in evidence. *Hessner v. Helms.* viii. 178
189. If illegal evidence has been given, without objection, it is not error in the court to treat it as legal evidence. *McCulloch v. Wallace and another, Executors.* viii. 181
190. An agreement, entered into by two brothers, designating which tracts of land they respectively chose, under an authority in their father's will, to take certain lands at an appraisement, may be given in evidence, by the plaintiff, in an ejectment, by one of the brother's, against a person to whom the executors had made an unauthorized sale, to recover the land chosen by the plaintiff, without having given notice of such agreement to the executors. *Hoke v. Leman.* viii. 248
191. Articles of agreement were entered into between the plaintiff and defendant, by which the former agreed to sell a tract of land to the latter, who was to pay one-third of the purchase money, on a certain day, on which a good title was to be given, free of all incumbrances, and the remaining two-thirds by instalments. The defendant went into possession, but the first payment not being completed on the day agreed upon, no conveyance was made or tendered by the plaintiff. The defendant subsequently made several payments, on account of the first instalment, which was never fully paid. Some time afterwards, the plaintiff tendered a deed to the defendant, who refused to accept it, on the ground that it was too late. *Held*, that in an action for the purchase money, the defendant could not give in evidence, damages sustained by him, in consequence of the plaintiff's being unable, or unwilling to give him a title at the day. *Cassell v. Cooke.* viii. 268
192. When legacies have been charged upon land, they may, in proof of performance of a covenant to convey free from incumbrances, be shown to have been paid, by receipts of the legatees, or any other written evidence. A discharge by deed, need not be produced. *Ibid.*
193. The record of a suit, brought before a justice of the peace, which

- was withdrawn before judgment by the plaintiff, who paid the costs, is not evidence, between the same parties, to show that the plaintiff, at the time of the institution of the suit before the magistrate, did not consider himself entitled to recover more than one hundred dollars. *Sweigert v. Frey, Administrator of Berk.* viii. 299
194. Nor can the record of a suit, brought against the defendant by a third person, who was one of several joint obligees in the bond, upon which the principal suit was founded, be given in evidence, to show that the defendant had paid him part of the money, for which the bond was given. *Ibid.*
195. Evidence may be given of the declarations of a witness, to contradict what he stated in his examination, or to show that he did not tell the whole truth. *Staple v. Spohn.* viii. 317
196. In an action against the managers of a lottery, to recover the amount of a prize, the confession of one of the defendants, that the plaintiff was owner of the ticket, is evidence. *Snyder, for the use of Etter v. Wolfley, and another, surviving obligors of Hipple and Gish.* viii. 328
197. A., the holder of a promissory note, having obtained a judgment against B., the drawer, assigned the judgment to C., who issued an execution, upon which the defendant was committed to prison, and afterwards discharged under the bread act, as a poor insolvent debtor. C. then sued A., for money paid and expended on the judgment, which had been assigned to him; and in this suit D., the indorser of the note, became special bail. *Held*, that in an action, brought by A., the holder, against D., the indorser, the record of the suit, brought by C. against A., was competent evidence, to show that the indorsee knew that the note had not been paid by the drawer. *McKinney v. Crawford.* viii. 351
198. An indorsement, made by a deputy surveyor, of "J. P., now J. L.," on the official draft of a survey, at the time the survey was made, is proper evidence to be submitted to the jury, to show the person to whom the application really belonged. *Vincent v. Lessee of Huff.* viii. 381
199. The assertion of a party, at the time of paying money, "This is the amount of T. (naming a tract of land;) it is mine now," is evidence, if made to a person entitled to receive the money, and not contradicted; or if spoken to another, in so loud a voice, as to make it quite certain that the words were heard by the receiver of the money. *Ibid.*
200. Evidence, that the witness "understood that it was the former owner of the land that received the money," is hearsay, and inadmissible. *Ibid.*
201. An unofficial paper, purporting to be a draft of a survey, signed by the person who was deputy surveyor, at the time it was supposed to have been made, but not in his official character, is not evidence, though both the paper, and part of the land, of which it purports to be a survey, have, for more than twenty-one years, been in the possession of the party producing it. *Farley, and another v. Lenox.* viii. 392
202. A paper, purporting to be an order from the surveyor general, to the deputy surveyor, not found in the office of the latter, and which is neither an original order, nor a certified copy of an official paper, and is without proof of the handwriting of the surveyor general, by whom it appears to have been signed, is not evidence. *Ibid.*
203. Where an account, with a receipt at bottom, left it doubtful whether a sum of money had been paid by a partnership, or by one of the partners, in his individual capacity, it was *held*, that it ought to be suffered to go to the jury, with permission to the party offering it, to explain the obscurity by other evidence. *Grier v. Huston.* viii. 402
204. Where the public book, in which the account of the county treasurer is kept, has been called for, and used by the plaintiff, the defendant may read from the same book, the treasurer's account, settled by the auditors of the county, without previously proving the handwriting of the auditors, or that they were the county auditors; or, that the person there called the treasurer, was so. It lies on the opposite party to show that they did not hold those offices. *Boggs, and others, Commissioners of Centre County, (for the use of McKean county,) v. Miles and others.* viii. 407
205. A certified copy of the report of

- the settlement of a county treasurer's account, made by the county auditors, and filed among the records of the county Court of Common Pleas, in pursuance of the directions of the act of the 30th of *March*, 1791, is not better evidence than the original account, settled in the treasurer's public book. *Ibid.*
206. If it appear that, in the account settled by the auditors, the treasurer has charged himself and credited the county, which was indebted to him, with a sum of money, for the amount of which he has drawn an order on the treasurer of another county, it is decisive evidence, in an action brought for the use of the county, against the person on whom the order was drawn, that the county has received the money, whether the order was paid or not. *Ibid.*
207. To bring the case within the act of the 20th of *March*, 1810, section 11, which declares that "the appellant shall not be permitted to produce as evidence in court, any books, papers or documents which he shall have withheld from the arbitrators," the papers, &c. must have been in the power of the appellant when called for before the arbitrators and voluntarily withheld by him. *Brisbane v. Mitchell.* viii. 423
208. M. and G. were indebted to C. and N. and also to D. who at the same time, held two promissory notes drawn by C. and N. On the 10th of *August*, 1816, C. and N. made an assignment for the benefit of their creditors. On the 27th of the same month, D. made a similar assignment. On the 5th of *August*, 1816, D. wrote from *Philadelphia* to M. and G. in *Selin's Grove*, informing them of the desperate state of C. and N's. circumstances, that they would make an assignment in a few days, and informed them that he held the two notes above mentioned, which he proposed to indorse to M. and G. to enable them to set them off against the debt they owed to C. and N. M. and G. received these notes and gave to D. their note indorsed by S. for their amount, together with the amount of the debt they owed to D. This note was dated the 7th of *August*, 1816, but there was some evidence to show that it was not drawn until the 1st of *January*, 1817. An action was afterwards brought on this note for the use of the assignees of D. against S. the indorser; and it was held, that the two notes drawn by C. and N. in favour of D. which had been transferred to S. after the commencement of the action, might be given in evidence by the defendant not as a set-off, but for the purpose of showing that the transaction was a continuance to defraud the assignees of C. and N. *Richter v. Selin.* viii. 425
209. In an action against the indorser of a promissory note, drawn by one partner in the name of the firm, the ledger of the firm is evidence to show the existence of the partnership. *Ibid.*
210. A confession of judgment by the indorser of a promissory note, is evidence, but not conclusive, of notice of demand on the drawer, and refusal by him to pay the note or of waiver of such notice; but it may be explained and rebutted by the circumstances under which the confession was made. *Ibid.*
211. Where a witness swears upon the *voire dire*, that he does not know whether he is interested in the event of a suit or not, his interest may be proved by other evidence. *Shannon and others v. The Commonwealth, for the use of Lazarus.* viii. 444
212. A protest of a captain and crew of a boat employed in inland navigation, is not evidence. *Gordon and Walker v. Little.* viii. 533
213. For the purpose of destroying the validity of a paper set up as a will, evidence may be given, that in consequence of a paralytic stroke, some time before the execution of the paper, the testator's intellects were much impaired, and continued so until the time of its execution, and afterwards. *Irish v. Smith.* viii. 573
214. A witness who is called to impeach an alleged will, on the ground of the mental imbecility of the testator, may be asked, on the cross examination, whether he has not accepted a devise under the will. *Ibid.*
215. If evidence be rejected, not because it is incompetent, but because offered at an improper time, it is not error. *Ibid.*
216. A witness may be asked whether she knew whether or not the eyesight of the testator was good enough to have enabled him to recognise her, when near her, if his mind had been right. *Ibid.*
217. A witness may be permitted to testify that he "visited the testator;

- he would look at him with a vacant stare; after speaking with him, and telling him who he was, he would answer; his countenance and appearance indicated childishness." *Ibid.*
218. Evidence that the wife of the testator observed to a witness in the presence of her husband "that he did not attend to business, that he was incapable," to which the husband said nothing, is admissible. *Ibid.*
219. Where the validity of a will is impeached on the ground of the incapacity of the testator and of fraud in procuring it, and an earlier will is attempted to be established, a cancelled will, in his handwriting, and found among his papers, made at an antecedent period, when his understanding was unquestionable, and he was not assailed by intrigue, may be given in evidence, to show what were then his intentions as to the disposition of his property, and also to show his manner of cancelling a will which he meant to annul. *Ibid.*
220. Entries made by a testator in a book, are a circumstance in favour of the sanity of his mind, but not conclusive. The weight to which such evidence is entitled, rests with the jury. *Ibid.*
221. The jury may infer incapacity to make a will from facts anterior to its execution. *Ibid.*
222. Where there is no evidence of infirmity of mind at the time of the execution of a will, and the subscribing witnesses are uncontradicted, infirmity may be inferred from anterior and subsequent facts. *Ibid.*
223. An inference of infirmity of mind cannot be drawn from a conversation between the testator and a witness, without disclosing to the jury what the conversation was. *Ibid.*
224. In support of an action for money had and received, a receipt signed by the defendant, for goods deposited in his store by the plaintiff, is evidence. *Wiherup v. Hill.* ix. 11
225. In a suit against a justice for not certifying a recognizance entered into by the plaintiff, in consequence of which the plaintiff's appeal from the judgment of the justice was dismissed, evidence is admissible that the plaintiff tendered bail to the justice more than six months before the suit against the justice, because, though this was before the six months, the neglect to certify the recognizance may have been within that period. *Prather v. Connelly.* ix. 14
226. Parol evidence of the declarations of the grantor is admissible to prove the identity of a lot referred to in a deed by him conveying certain "lots in the town of H., marked on the recorded plan of said town," notice having been given to one of his executors, a defendant in the suit, and he having proven that he never saw any such recorded plan, and the records of the proper county having been diligently searched without finding any recorded plan. *Patton v. Goldsborough.* ix. 47
227. Confessions by a grantor that he had conveyed a certain lot, are evidence against him and his executors, of the identity of the lot referred to in the deed, but evidence of the declarations or acts of the grantor subsequent to his deed, is not admissible to defeat the grant, by showing that it was not the lot referred to. *Ibid.*
228. The declarations of a vendor after a sale, who is not party to the suit, are not evidence, especially to contradict a written instrument. *Brindle v. McIlvaine.* ix. 74
229. When the defendant in a suit on a bond for part of the purchase money of land, sets up a defect of title and misrepresentation as a defence, a recovery in a former suit on another bond for part of the purchase money, on which it is alleged the same defence was made, is no reason why the court should reject the evidence of the defendant; whether the same matters had been tried in the former action is for the jury. *Crotzer v. Russell.* ix. 81
230. The sheriff's docket is not evidence to show the time when an inquisition was held on a *fi. fa.* where there is a blank left in the inquisition, but the time may be shown by parol evidence. *Thomas v. Wright.* ix. 87
231. In a suit for money lent, an indorsement on a bond given after the loan by the plaintiff to the defendant, that suit was brought on the bond, is not evidence on behalf of the defendant of that fact. *Lehn v. Lehn.* ix. 57
232. But an indorsement on the bond of a receipt of a sum equal to the amount loaned with interest to the time of the receipt, is evidence to

- show an extinguishment of the loan, and unless explained is conclusive. *Ibid.*
233. The administration account is not evidence on behalf of the administrator to show that there was no debt due from the intestate to the plaintiff. *Ibid.*
234. In an action by the vendor for non-performance by the vendee of a contract to purchase real estate, the vendor in making out his title, cannot give in evidence the sheriff's deed, without showing the judgment and execution. *Hampton v. Speck-nagle.* ix. 212
235. An exemplification of proceedings in the Orphans' Court, to value and make partition of real estate, is not evidence, unless the whole record is exemplified. *Ibid.*
236. Evidence of circumstances to show a family arrangement at the execution of deeds is admissible; and a deed otherwise invalid, would be good evidence if it formed a component part of such arrangement. *Jourdon v. Jourdon.* ix. 268
237. If a servant in the course of delivering out goods to customers make memoranda, and the same night or next day, entries are made by the master in books from these memoranda, such books are books of original entries, and are admissible accompanied with the master's oath, as evidence to charge a customer. *Ingraham v. Bockius.* ix. 285
238. The declarations of the deputy sheriff respecting the execution of a writ made after the return day, but while the writ is in his hands, are evidence against the sheriff. *Wheeler v. Hambright.* ix. 390
239. Where the judgment below is reversed, and a *venire de novo* awarded, if, on another trial the opinion of the Supreme Court is read to the jury by one party, the other may read the charge of the court below, to explain the opinion, though not as evidence of the law or fact. *King v. Diehl.* ix. 409
240. In an action by the widow for her share of the surplus monies arising from the sale of a tract of land, ordered by the testator to be sold, and undisposed of by will, evidence is not admissible of an action of dower brought by her, to recover her dower in another tract belonging to the testator, which is the subject of a different devise. *Wilson v. Hamilton.* ix. 424
241. Some title or spark of title in the grantor must be shown, before a deed from him can be read in evidence. *Hoak v. Long.* x. 9
242. A witness may state the substance of what was sworn by a witness on a former trial; he is not obliged to testify the very words. *Cornell v. Green.* x. 14
243. It seems, notes of the evidence testified by the oath of the person making them, are sufficient if they contain the true substance of what was said. *Ibid.*
244. An act of the vendor after selling lands, is admissible in evidence to explain the whole of a transaction, respecting which the opposite party has given partial evidence. *Reigart v. Ellmaker.* x. 27
245. An assignment of the cause of action, after action brought, is admissible in evidence, where it is referred to in the record, and the jury are sworn in the name of the *cestui que use*, as plaintiff. *Ibid.*
246. Evidence of general character of a party, is admissible only in actions when character is put in issue. In debt, the plea of payment, does not put the character in issue. *Anderson's Executors v. Long.* x. 55
247. Where the defendant proves circumstances, showing an anticipated payment of a bond, and the obligee is dead, the plaintiffs, his representatives, may give in evidence to repel the presumption, that the testator received large sums of money about that time, and was not in want of funds. *Ibid.*
248. The declarations of a grantor of a mill, and of his son and heir, that all the water passed to those in possession, under a subsequent grant of another tract, through which the water ran, are admissible in a suit against one claiming under the latter, for obstructing the water. *Strickler v. Todd.* x. 63
249. Comparison of hands, is evidence in civil cases, where it goes in corroboration of other evidence, tending strongly to support the fact disputed. *Farmers' Bank v. Whitehall.* x. 110
250. *Query*, Whether an assignment, by an assignee, of all his interest in land, indorsed on the original articles of agreement for the purchase of it, dispenses with the necessity of proving the articles, or any previous assignment, indorsed thereon. At all events, a subsequent assignment

- by his assignee, must be proved in the ordinary way, by a subscribing witness. A reference to such subsequent assignment, in a contract signed by the defendant, is not sufficient to dispense with the ordinary, if it refers to it generally, and contains nothing to identify it. *Gardner v. Grove.* x. 136
251. If one party gives evidence of sufficient personal assets remaining, in order to show that the sale of the land of an intestate was fraudulent; the other party may rebut such evidence, by proof that the personal property was swept away by debts. *Nass v. Vanswearingen.* x. 144
252. When a party gives in evidence his books of original entries, kept by another, who is absent from the state, and whose handwriting is proved, the opposite party may give evidence as to the general character for honesty of such absent person. *Crouse v. Miller.* x. 155
253. If an exception is taken to the opinion of the court, rejecting evidence, and the same evidence is afterwards admitted, the exception cannot avail the party. *Ibid.*
254. A certificate of a notary, in a foreign country, of proof, before him, of two witnesses of a power of attorney, for the sale of lands in *Pennsylvania*, is not sufficient under the act of 1705.
- Nor is evidence admissible in ejectment, by one claiming under such power, that other persons had purchased and held lands, in the same place, under the power; that the defendant held a lot, not the one in dispute, under it; or that the attorney had acknowledged, in writing, the subsequent revocation of his power, and the appointment of a new attorney by the principal. *Griffith v. Black.* x. 160
255. The admission or rejection of a witness, offered after the evidence has been concluded, and counsel have commenced speaking, is a matter of discretion with the court, and is not a subject of error. *Frederick v. Gray.* x. 182
256. If a party produce a letter in evidence, on trial, that is sufficient ground to make it evidence for the opposite party, in a subsequent trial of the same action. *Macclay's Lessee v. Work.* x. 194
257. A deed, fifty years old, from the person whose name was used in an application for land, in what was then *Northumberland*, since *Westmoreland* county, both the grantor and grantee, being described as of the city of *Philadelphia*; diligent search being made for the subscribing witness, in *Philadelphia*, and the handwriting of the grantor being proved, though possession did not accompany the deed, and there was a short adverse possession, allowed to go to the jury.
- Query*, What is the time, after which a deed, accompanied with possession, proves itself; and whether twenty-one years is sufficient.
- Title being traced to a grantee, described in the deed to him as of the city of *Philadelphia*, a copy of a will, alleged to be his, being offered in evidence, in which he describes himself as of *London Grove, Chester* county; whether he is the same person, is a question for the jury. The possession of the deed, by his devisees, is some evidence that he is. *McGennis v. Allison.* x. 197
258. Parol evidence may be given, to show that a mistake was made in the affidavit of an assessor, filed in the office. *Ibid.*
259. Parol evidence is admissible, to prove a long practice, in a county, for a sheriff to sell on a *venditioni exponas* after the return day, and such a sale is valid, when supported by a long practice. *Blythe v. Richards.* x. 261
260. Where it is proved that a *fiert facias* and *venditioni* existed, and are lost, the execution docket of the Court of Common Pleas is evidence to prove their contents, and the proceedings had upon them. *Buchanan v. Moore.* x. 275
261. Where the sheriff sold the property of A. and B. as "200 acres of arable land, more, or less, in *Newtown* township," and A. and B. had two adjoining tracts there, one of 114 acres and allowance, the other of 161 acres 32 perches and allowance; the declarations of A. at the time of sale, that the lands selling contained more than either of these tracts taken separately, are evidence in an ejectment by the purchaser against B. and others for the land—so A's. returns of the land to the assessor are evidence. *Ibid.*
262. The circumstance of A's. having assigned the land for the benefit of his creditors 20 years before the trial, does not prevent his declara-

tions being evidence if the assignees have never accepted nor interfered.

Ibid.

263. Parol evidence is not admissible of the contents of a written paper produced and read by the opposite party on a particular occasion, unless notice has been given him to produce it.

Declarations of a deceased person are evidence as to boundary; but not of those of a person living, who might be produced.

In a question as to the quantity of land purchased at sheriff's sale, evidence of the annual value of the land is immaterial, and not admissible. *Ibid.*

264. The declaration of the obligee of a bond before assignment as to his being paid the amount, are evidence in a suit to recover land in consideration of which the bond was given, brought against one holding the land by deed from the obligee of the bond and holding the bond also by assignment.

If the defendant give in evidence a verdict and judgment in a former suit respecting the land in controversy, to which the plaintiff was party, the plaintiff may show that the evidence given in the present cause was not known or produced.

Evidence is not admissible to show the general character of a witness for drunkenness. *Brindle v. M'Ilvaine.*

x. 282

265. If the debtor assign over to the creditor a bond payable to himself, but not yet due, and the assignment is silent as to its being transferred in payment, or not, parol evidence may be given by the creditor to show that it was transferred as a collateral security, and not as payment. *Leas v. James.*

x. 307

266. Where a witness is contradicted, and evidence is given to impeach his character, evidence may be given of what he swore on a former trial of the cause, in order to corroborate his testimony. *Henderson v. Jones.*

x. 322

267. A certified copy of a survey given by the surveyor general, under seal of office, is evidence, though it appear in such copy that part of the writing of the original survey had been obliterated.

But if the part obliterated, was that which recited the authority for making the survey, and there be no other evidence of any authority to make it, nor of the return being

accepted by the board of property, it is not evidence.

If an act of assembly authorize a sale by a guardian of the property of minors on entering into a certain recognizance to be approved of by the court, a certificate from the clerk of the Orphans' Court, that such recognizance was given, is not evidence: a copy of the recognizance should be stated, with the approbation of the court. *Jones v. Hollopheter.*

x. 326

268. Defendant assigned to the plaintiff a single bill in exchange for a horse, declaring in the agreement that he would not guaranty the bill.

Held, that in an action on the case, alleging a promise by the defendant to guaranty, and the insolvency of the obligor, parol evidence was not admissible to show an undertaking by the defendant to guaranty the bill, no fraud, mistake, or omission of the scrivener being alleged. *Heagy v. Umberger.*

x. 339

269. After the protest of a notary has been given in evidence by the plaintiff in a suit against the indorser of a promissory note, the defendant may call the notary to explain the protest, and even, it seems, to contradict it.

Query, Whether the notary himself may object to being questioned, for the purpose of contradicting his certificate of protest. *Craig v. Shallcross.*

x. 377

270. A paper, certified by the surveyor general to be a true copy of a list of the first grantees or renters from the proprietaries, extracted from book No. 31, remaining in his office, is evidence in ejectment to show title.

A commission was returned from *Barbadoes*, and the return certified, that "the execution of the commission appeared by the examinations hereto annexed." *Held*, that a deposition not fastened to the commission, but enclosed in a cover under the hands and seals of the commissioners, and subscribed by them, was evidence, there being no reason to suspect fraud or imposition.

A copy of the register of marriages, baptisms, and burials of a parish in the island of *Barbadoes*, certified to be a true copy by the rector of the parish, proved by the oath of a witness, taken before the deputy secretary of the island and notary public, (his handwriting and office being

- proved,) under his hand and notarial seal of office, held good evidence to prove pedigree. *Kingston v. Lesley.* x. 383
271. Where a dispute has been settled by the agreement of the parties, it is not competent to one of the parties, in an action upon the agreement, to give evidence which relates exclusively to the subject-matter of the original dispute. *Berks and Dauphin Turnpike Company v. Handel et al., Ex'rs of Meyers.* xi. 125
272. Evidence is not admissible to show that an entry on the docket, in a suit pending "settled as per agreement filed," was made by the court against the consent of the defendant. *Ibid.*
273. On an issue of *devisavit vel non*, a witness may be asked "whether from his actual knowledge of the alleged testator, he considered him fit or unfit to make a will. *Wogan v. Small.* xi. 141
274. In proving what was testified by a deceased witness on a former trial, it is not necessary that the *very words* spoken by him should be sworn to. But the person who undertakes to prove his evidence must be able to state the substance of *the whole of what was said on the particular subject, which he is called to prove.* If he can only prove what was sworn to by the deceased person, in his examination *in chief*, without giving the cross examination, it cannot be received in evidence. *Wolf v. Wyeth.* xi. 149
275. A witness having proved that an agreement in writing, (which was proved to have been destroyed,) had been entered into between the plaintiff and himself, relative to the compensation to be given to the plaintiff for his services in conducting a land lottery, which compensation the defendant had undertaken to pay, on receiving a transfer of the interest of the witness in the lottery, the defendant proposed to ask him, *whether if the lots had been sold to persons unable to pay for them, he would have considered himself bound to pay the defendant the amount of the compensation?* Held to be inadmissible, because the answer would not tend to prove the contents of the agreement; but merely show what he believed he would have done on a certain event. *Swan v. Scott.* xi. 155
276. An offer to pay an award of arbitrators, within the time allowed for an appeal, partly in bonds and partly in money, is not in the nature of a compromise, but a mode of payment; and therefore, in an action on a bond given in satisfaction of the award, such offer may be given in evidence to show an acknowledgment of the validity of the debt. *Ibid.*
277. It is also evidence to remove an imputation of fraud in obtaining the bond. *Ibid.*
278. If from the testimony it is doubtful whether such offer were made as a compromise or a mode of payment, it is proper for the court to leave it to the jury to determine, with what view the offer was made. *Ibid.*
279. A deposition taken by consent while a cause is depending before arbitrators, from whose award an appeal has been entered, cannot be read in evidence on the trial of the appeal, unless the witness be dead, or not within the state. *Forney v. Hallagher.* xi. 203
280. If a deposition be objected to *in toto*, without specifying the exceptionable parts, this court will not reverse the judgment if any part of it be legal evidence, though other parts may be inadmissible. This is the general rule, to which there may be exceptions, to be decided on as they arise. *Anderson et al. Ex'rs. of Porter, v. Neff.* xi. 208
281. The omission to state in a certificate of the acknowledgment of a deed, that the person before whom the acknowledgment was made was a justice of the peace of the county in which the land was situated, does not render the certificate void. It may be supplied by parol proof, that he was an acting justice of the peace at the time the acknowledgment was taken. *Scott v. Gallagher.* xi. 347
282. Where the handwriting of a deceased subscribing witness to a deed has been proved, the court has no right itself to examine witnesses, and on a belief that the instrument is forged, withdraw it from the jury. *Ibid.*
283. Where in an action brought by a bank on a single bill, the defence was, that the bank had loaned to A. 10,000 dollars, on the security of certain bonds for 11,000 dollars with warrants of attorney to confess judgment, and accompanied by the in-

- dorsed note of A., which it was understood was not to be proceeded on, it being given merely to comply with the forms of the bank, and that it was agreed, that what remained of the proceeds of the bonds after satisfying the debt of 10,000 dollars with the interest, should be applied to the payment of the balance due on the single bill, which was given by the defendants as sureties for another debt, previously due to the bank by A., and that in consequence of the bank not having used due diligence in collecting the bonds, the defendants lost all benefit of them; evidence that the directors of the bank had authorized the loan of 10,000 dollars on the assignment of the bonds, and A's. note, and that no recourse was to be had on the note against the drawer or indorsers, without proof of the agreement that the surplus was to be applied to the payment of the debt in suit, was held to be irrelevant and inadmissible. *Stewart v. The Huntingdon Bank.* xi. 267
284. Declarations by the officers of the bank, unauthorized by the board of directors, that the bonds were to be applied to the payment of the debt due by A., and the money he was about to get, are not evidence against the bank. *Ibid.*
285. Where papers, in themselves irrelevant, have been permitted to be read to the jury, with an understanding that they will be followed by evidence, connected with which they would be relevant, but such evidence is not given, they cannot be argued upon by counsel, and sent out with the jury as evidence in the cause. *Ibid.*
286. Where a deputy has been appointed by deed, the deed must be produced and proved like other deeds. *Beale's Ex'rs. v. The Commonwealth, for the use of Worrell, et al.* xi. 299
287. A return to a *fi. fa.* of, levied on certain specified articles, together with all the defendant's personal property, is *prima facie* vidence of a levy to the value of the debt; and in an action against the surety of the coroner, for the coroner's refusal to sell the goods of the defendant in the execution, it casts upon the defendant the burthen of proving the value of the whole of the goods of the defendant in the execution. *Ibid.*
288. He cannot be permitted to prove the value of the goods specified in the return alone. *Ibid.*
289. Where it is necessary to enable the jury fully to understand all that passed between the parties, a conversation between a witness and a third person, merely of an introductory and explanatory nature, may be given in evidence. *Harper et al. v. Kean.* xi. 280
290. What was said by a third person as to the quality of an article, though communicated to the defendant, is not evidence. *Ibid.*
291. Where a contract is proved, partly by letters between the parties, and partly by verbal communications, it is not error to submit the nature of the contract to the jury upon the whole evidence. *Ibid.*
292. If a deputation be by deed, the deed must be produced and proved like other deeds; and if the subscribing witness does not attend, parol evidence cannot be given of the alleged deputy having acted in that capacity. *Beal's Ex'rs. v. The Commonwealth, for the use of Smedley et al.* xi. 305
293. Where it is alleged, that a survey which has been returned by a deputy surveyor, for A. ought to have been returned for B., a draft found among the official papers in the office of the deputy surveyor of the district, not signed by any officer, nor returned to the surveyor-general, nor purporting to have been made for B., or any other person, but in the handwriting of the deputy surveyor, is admissible evidence in support of B's. title. *Hoover et al. v. The Lessee of Gonzalus et al.* xi. 314
294. In ejectment, where the plaintiff did not purchase the land in dispute from the defendant, or any person under whom he claimed, evidence of what was the value of the land at the time the plaintiff purchased it, is inadmissible. *Ibid.*
295. A deed executed by one of the plaintiffs in ejectment, after the commencement of the suit, reciting that he was indebted in a certain sum of money to a particular person, payment of which he wished to secure, and conveying to the grantee all his interest in the premises, in confidence to sell and dispose of the same and pay the debt to the creditor, cannot be given in evidence by the defendant. *Ibid.*
296. How far and for what purposes,

- proceedings of the board of property are evidence. *Ibid.*
297. That a surveyor *ran the lines of particular draft and found them on the ground according to that draft, that he blocked the trees and found them answer exactly to the date of the survey*, are facts which may be given in evidence, and not merely the conditions of the surveyor. *Ibid.*
298. A survey of a tract of land near the land in dispute, is evidence to show that the deputy surveyor was in the neighbourhood, about the time at which the party offering it, alleges his own survey to have been made. *Ibid.*
299. Where the court, on the application of the creditors of the defendant open a judgment for the purpose of trying whether the bond on which the judgment was entered, was not given in a contrivance between the plaintiff and defendant to defraud the creditors, it is not necessary that the creditors should be made parties to the suit. *Whiting v. Johnson.* xi. 328
300. In such a case, the declarations of the defendant in the absence of the plaintiff, respecting the amount of the debts he owed the plaintiff, cannot be given in evidence by the creditors. *Ibid.*
301. Nor is a declaration by the defendant, "that if a man cannot make both ends meet, he ought to secure something for his family," admissible in evidence. *Ibid.*
302. After a paper has been read to the jury, and evidence given by the opposite side, of declarations by one of the parties to the suit, as to where it was found, that party cannot be examined to prove where the paper was found, in contradiction to his declarations. *Lodge v. Pipher et al.* xi. 333
303. A witness, who, though a man of business and much conversant with writings, had never been employed in detecting forgeries, cannot be asked whether papers, proved to be in the handwriting of a particular person, and a paper alleged to have been forged, are in his opinion in the same handwriting. *Ibid.*
304. *It seems*, that such a question would not be proper even to an *expert* in the examination of writings. *Ibid.*
305. If a person, called to prove what a deceased witness testified, states that he recollects the amount and substance of what the deceased said; that he recollects that there was a cross-examination, but cannot recollect what questions were put, he cannot be received as a witness. *Watson v. Gilday.* xi. 337
306. The admission of a person under whom the plaintiff claims, by deed subsequent to the admission, as to the situation of a corner tree, pointed out to him by a third person, is evidence of boundary against the plaintiff; the person who made the admission being dead at the time of trial. *Benner v. Hauser et al.* xi. 352
307. Evidence that the defendant was in possession of the land in dispute, and had purchased it at a period antecedent to the date of his deed, is admissible. *Ibid.*
308. Where the party offering evidence is called upon to state for what purpose it is offered, he will be confined to the point proposed to be proved; but if the evidence be objected to *generally*, all that is incumbent on the party offering it, is to show, that it is proper for some purpose. *Ibid.*
309. Where a general partnership is alleged by the plaintiff, and denied by the defendants, who admit a special partnership, a subscription to the stock of a navigation and insurance company, made in the name of the firm by the partner denying the general partnership, may be given in evidence by the plaintiff as one step towards proving a general partnership. *Allen et al. v. Rostain.* xi. 362
310. If the defendant traverse the averment of a tender of a deed on a day different from that on which the plaintiff covenanted to make it, he cannot object to evidence in support of such averment, on the ground that it does not show a tender at the time agreed upon. *Edgar v. Bois.* xi. 445
311. In an action by the widow of an intestate, upon the recognizance entered into in the Orphans' Court to secure her interest in her husband's real estate, the defendants may give in evidence that before the arrears for which suit is brought accrued, that interest had been levied on, and sold under a judgment and execution against her; and if the sheriff has not executed a deed to the purchaser, this is no objection to the competency of the evidence. *Shaufe v. Shaufte.* xii. 9

312. A receipt was offered by the plaintiff, signed M. and L., one of whom, M., was alleged to have been the agent of the defendant, to prove which a witness was called, who testified that he had done business with M., as the agent of the defendant, one or two years after the date of the receipt, and that the defendant, about the same time, said that M. was his agent, and did business for him. The court below admitted the receipt, at the same time instructing the jury to take into consideration, if they believed the witness, but, if they disbelieved him, entirely to reject it. *Held*, that this was an error. *Irvine v. Buckaloe*. xi. 35
313. Declarations made to the plaintiff by the alleged agent of the defendant, in respect of the concerns of a third person, without proof that those declarations were made in the course of the business of the agency, or that the defendant had in some manner given to the alleged agent authority to bind him in the matter referred to, are not evidence. *Ibid*.
314. Possession of an order by the person on whom it is drawn, though the order be payable to a particular person, and not indorsed by the payee, is *prima facie* evidence that it has been paid. *Zeigler v. Gray*. xii. 42
315. An entry on the books of an incorporated bank, is not admissible as evidence to show a deposit of money, in a suit to which the bank is not a party, unless it be proved that the clerk who made the deposit is dead, or beyond the reach of the process of the court. *Philadelphia Bank v. Officer*. xii. 49
316. Nor is it evidence to explain an entry in the private bank book of the opposite party, if the private book be only exhibited on notice to produce it, given by the party offering the book of the corporation. *Ibid*.
317. Evidence that the drawers of a note discounted in bank, had, without the privity of the bank, informed the indorser, prior to putting his name to the instrument, that the bank had agreed to look to certain other securities for payment, and not to hold the drawer or indorser liable, is not admissible in an action of the bank against the indorser. *Lyon et al. v. The Huntingdon Bank*. xii. 61
318. Where two actions, one brought by A. and B., and the other by A. alone, against the same defendant, were by consent tried together, *held*, that a deposition taken in the suit, brought by A. alone, stating that the defendant promised to pay interest on both accounts, might be read in evidence by the plaintiffs. *Smith v. Lane et al*. xii. 80
319. The books of a miller, sworn to be the original books kept in the mill, and to be correct, which contained an account of the delivery of the defendant's wheat to be ground at the mill, and of his flour, to certain wagonners, said to be in the employ of the plaintiffs, but which did not contain daily entries of the general transactions of the mill, nor of all the flour delivered to the wagonners of the plaintiffs, who were extensive merchants, and generally, (but not always,) sent with their wagonners written orders for flour, which orders were afterwards burnt by the miller, *held* not to be evidence, to show the number of barrels of flour, belonging to the defendant, delivered to the plaintiffs; the entries in the books not having been always made at the time of the delivery of the flour, but sometimes from memoranda made in the absence of the book-keeper, which he afterwards entered in the books; the book-keeper being alive, and within the jurisdiction of the court at the time of the trial, and the wagonners, to whom the flour was delivered, not being called, or their absence accounted for. *Ibid*.
320. An acknowledgment, in an agreement for the conveyance of land, of the receipt of the purchase money by the covenantor, is evidence of that fact; but it is not conclusive, and the covenantor is not estopped from showing, that the money has not been paid. *Watson, administrator v. Blaine, executor*. xii. 131
321. A connected draft of two surveys, in the handwriting of the deputy surveyor, without proof that it had ever been in the office of the deputy surveyor of the county, or returned to the surveyor general is not evidence; particularly, where the deputy surveyor was interested in the warrants, under which the surveys were made, and the party offering the draft claims under him. *Blackburn et al. v. The Lessee of Holliday*. xii. 140
322. Proceedings of the board of property, offered under pretence of

- proving a custom of the land office, but which have not that tendency, and have no relation to the cause under trial, are not evidence. *Ibid.*
323. Where, in ejectment, the main defence was, that the warrants under which the plaintiff claimed were fraudulently obtained, the records of the land office, (showing that a number of warrants issued about the same time, on the record of which, there was a mark, showing that five shillings were paid on their entry, while no similar entry or mark could be shown on the plaintiff's warrants,) were held to be evidence to show the custom of the land office, and that the warrants under which the plaintiff claimed, had not issued in the regular course. *Ibid.*
324. A survey made before the commencement of the suit, but not accepted until afterwards, may be given in evidence. *Ibid.*
325. Evidence cannot be given of the character of a deputy surveyor, not a witness in the cause, by whom a survey was made, under which the plaintiff claims, and who was himself interested in it: though the plaintiff derives title from it. *Ibid.*
326. A printed copy of an act of assembly, published under the authority of the legislature of another state, may be read in evidence. *Kean v. Rice.* xii. 203
327. The record of condemnation of a vessel, by two justices of the peace, under an act of assembly of *New Jersey*, proved by the oath of a witness to be the original record, accompanied by evidence, that the signatures of the justices were of their handwriting, and that the justice's court had no seal, is admissible in evidence. *Ibid.*
328. The acts of Congress, prescribing the mode of authenticating records, do not exclude all other evidence. *Ibid.*
329. After an admission by a defendant, that he had at one time been interested in a firm, and that the first entry in the books of the firm had been occasioned by his having received a dividend of the profits, the books may be given in evidence to explain the nature of his interest and to show the extent of his admission; notwithstanding, he at the same time asserted, that his connexion with the partnership had ceased before certain notes signed by the firm, and upon which the suit was founded were issued. *Thommon et al. v. Kalbach et al.* xii. 238
330. The jury should be permitted to judge of the meaning of the admission: and it is error to withdraw the decision from them. *Ibid.*
331. On the plea of *non-assumpsit*, to an action founded upon an award of arbitrators, without notice of special matter, the defendant cannot give mistake of the arbitrators in evidence. *Taylor et al. v. Coryell et al.* xii. 243
332. An examined copy of the books of an incorporated bank, uncorroborated by any other proof, is not evidence. *It seems*, that it would be evidence, if accompanied by proof that the original entries were made by an officer of the bank; this proof to be made by the officer himself, if to be found, and if not, his handwriting to be proved. *Ridgway v. The Farmers' Bank of Bucks County.* xii. 256
333. Parol evidence of the declaration and intention of the grantor, in a deed, is not admissible. *M'Williams v. Martin.* xii. 269
334. After a man has made a sale, his declarations cannot be given in evidence to invalidate it. *Babb v. Clemson.* xii. 328
335. Declarations by the servant of a debtor, who had made an assignment of property to the plaintiffs, of which the servant had the care, that after the assignment, while he was in the house of the debtor, in which the plaintiff also resided, he was hired and paid by the plaintiff, are admissible in evidence; the servant having left the country before the trial. *Ibid.*
336. A paper containing an account of carpenter's work done in the country by the plaintiff for the defendant with the prices according to the book of the rates of the city of *Lancaster*, unsupported by any proof that the prices of the work done were reasonable, is not evidence. *Summers v. M'Kim.* xii. 405
337. A deposition drawn up privately by one of the counsel in the cause, from the mouth of the witness, and afterwards sworn to before a justice, under a rule to take depositions, is not admissible in evidence. *Ibid.*
338. A deposition taken before a justice, under a rule, ought to be reduced to writing from the mouth of the witness in the presence of the justice. *Ibid.*

339. Plaintiff called on defendant for a paper, and finding something in it not expected declined reading it. The defendant is not thereby entitled to give the paper in evidence. *Ibid.*
340. The defendant cannot give in evidence, an account book kept by him of the plaintiff's work and labour. *Ibid.*
341. Unconnected scraps of paper, containing, as alleged, accounts of sales by an agent of articles on account of his principal, irregularly kept on their face, are not admissible as a book of original entries.
342. Such evidence is to be extended beyond former limits. *Thompson v. M'Kelvey.* xiii. 126
343. Where the court may reject evidence, as irrelevant. *Reed v. Johnston.* xiii. 216
344. Evidence is not admissible of declarations made at the time of subscribing to a seminary, by one not a trustee or party to the suit, especially if on the faith of the defendant's subscription, others afterwards subscribed. *Davis v. Meade.* xiii. 281
345. The certificate of the presiding judge of a district is evidence to show him interested in a cause, so as to justify its trial by a neighbouring president, but not to show that the suit is not pending. *Voris v. Smith.* xiii. 334
345. Under the plea of payment to debt on a bond given by the defendant to the plaintiff's testator, in part consideration of a tract of land in Virginia, the defendant offered a witness to prove that he had gone to Virginia and had traced the lines of a patent, (produced to the court,) delivered to him by his father, the defendant, and that it was the only patent for lands in Virginia he had ever known to be in his father's possession; that the land contained in the patent was situate on a mountain, and not worth the taxes. To this evidence the plaintiff objected, that, unless the deed from the plaintiff's testator was produced, it could not appear to be the same land. The defendant then stated on his *voir dire* that this deed was lost, and, though searched for, could not be found. Held, that the evidence was admissible. *Paul v. Durborow.* xiii. 392
346. In an action by the assignee of a promissory note against the drawer, the defendant cannot, under the plea of payment, give in evidence declarations made by the assignor, before the assignment, "that he would fix the drawer," &c. if no notice has been given by the plaintiff that such declarations would be offered in evidence. *Lighty v. Brenner.* xiv. 127
347. In a feigned issue, to try whether a judgment which had been assigned to the plaintiffs, is a lien upon the lands of the defendant, declarations by the assignor, made before the assignment, that a few days after the entry of the judgment, and when its entry was unknown to the defendant, he had paid to the assignor three hundred dollars, in consideration of which the latter had agreed not to enter the judgment, may be given in evidence by the defendant. *Kellogg v. Krauser.* xiv. 137.
348. Though the opinion of a witness, as to the value of land, is not strictly a fact, yet he may be asked what was the value of certain mortgaged premises, in the possession of the defendant, at the time the judgment was entered against him, on the bond accompanying the mortgage. *Ibid.*
349. On the trial of a cause in the Court of Common Pleas, the original records of that court, removed to the Supreme Court on a writ of error, and there remaining, may be given in evidence. The docket entries of the Court of Common Pleas may also be given in evidence, after the records have been removed. *Eisenhart v. Slaymaker.* xiv. 153
350. The order of giving evidence is at the discretion of the court before which the cause is tried, and is not the subject of a writ of error. It therefore is not error to permit a judgment and the proceedings thereon, under which the plaintiff in ejectment claims, to be given in evidence, without previously showing some colour of title in the defendant in the judgment, if it appear subsequently that the defendant in the judgment came into possession under the defendant in the judgment. *Ibid.*
- A copy of a notice to quit is competent evidence, without notice to produce the original. *Ibid.*
351. Where the defendant neglects to give the notice of special matter required by a rule of court, the admission of other evidence, without objection by the plaintiff, will not entitle the defendant to give in evidence,

- that of which he ought to have given notice. *Wilson v. Irwin.* xiv. 176
352. Nor can he, by setting out in the form of a plea of set-off, the special matter which he might have given in evidence under the plea of payment with leave, &c. if notice had been given, either give such special matter in evidence or entitle himself to a continuance. It is not error to refuse such a plea to be added. *Ibid.*
353. Evidence that a horse was received by the defendant in exchange for a patent right, is not admissible, either under a count for money paid, laid out, and expended, or for money had and received. *Doebler v. Fisher.* xiv. 179
354. In an action on a promissory note against the administrator of the drawer, the defendant may, under the plea of payment with leave to give the special matter in evidence, prove that as administrator he had assigned to the plaintiff the note of a third person, of greater amount than the claim of the plaintiff, and that the amount of the note thus assigned had been paid to the plaintiff. *Bailey v. Bailey.* xiv. 195
355. Where, in an action against an administrator, on a promissory note of the intestate, none of the pleas deny that the defendant has personal assets to satisfy the plaintiff's claim, the defendant cannot give in evidence a record of the Orphans' Court, showing that on a valuation and appraisal of the real estate of the intestate, the plaintiff, who was his brother, took it at the appraisal, giving security to the other heirs. *Ibid.*
356. A printed advertisement is not admissible in evidence, where it appears from the testimony of a witness, that the original manuscript from which it was copied was given to him, and that he had left it with the printer of a newspaper, by whom it was published; that he had not inquired for it of the printer, and had made no particular search for it among his papers, but that he believed it to be lost. *Sweigart v. Lowmarter.* xiv. 200
357. In an action on a bond, given for the purchase money of a tract of land, the defendant may, under the plea of payment and notice of special matter, prove that while he was treating for the purchase, the plaintiff showed him, as the boundaries, lines which were afterwards found not to be the boundaries of the land conveyed, and that the lines designated in the conveyance excluded the land which was shown to him as part of the tract. *Stubbs v. King.* xiv. 206
358. After the plaintiff has given in evidence his book of original entries, and a letter from the defendant, acknowledging the receipt of several letters from the plaintiff, but without mentioning their contents, stating his inability to pay the balance due to the plaintiff and asking further time, the plaintiff cannot give in evidence his journal and ledger, to show what was the balance due. *Worman v. Boyer.* xiv. 212
359. A receipt, signed in the name of the plaintiffs, by a brother-in-law of one of them, who lived near them, was often in their store, and in habits of intimacy with them, is not admissible in evidence. *Ibid.*
360. If a notice to produce papers be not complied with, copies of the papers may be read, or their contents proved; but the court has no power to require their production under the act of the 27th of February, 1798. *Ibid.*
361. In an action on a single bill, the defendant may, under the plea of payment, with notice of special matter, prove that the bill was taken, subject to a parol agreement made long before its date. *Lyon v. The Huntingdon Bank.* xiv. 283
362. In an action on a bond given for the price of a tract of land, which by articles of agreement the plaintiff had contracted to sell to the defendant, and was said to contain two hundred and twenty-five acres, and for which a deed was afterwards executed, conveying the tract by metes and bounds, and calling it two hundred and twenty-five acres, but it turned out to be deficient in quantity, the defendant may prove, that, at the execution of the articles of agreement, the plaintiff asserted that the tract would be found to contain two hundred and twenty-five acres, and called on the bystanders to witness that he would make his assertion good. *Frederick v. Campbell.* xiv. 293
363. In ejectment, the defendant may give in evidence the declarations and acts of the plaintiff, tending to prove that he had made a parol sale of his interest in the land in dispute, accompanied by payment of the pur-

- chase money and delivery of the possession. *Clark v. Vankirk.* xiv. 354
364. Where, in slander, the words laid are, that the defendant said that the plaintiff had *stolen* property; and the witness offered by the plaintiff can only testify, that the defendant said that the plaintiff had either *taken* or *stolen* it, without being able to say which expression was used, the court ought to receive the evidence, and leave it to the jury to determine, from the sense of the whole conversation, which expression was used. *M'Almet v. M'Clelland.* xiv. 359
365. A repetition of the charge, after suit brought, may be given in evidence to show malice, in an action of slander. *Ibid.*
366. In slander evidence is admissible to prove the defendant's situation in point of property. *Ibid.*
367. A paper, containing the draught of a survey, and a copy of field notes, indorsed, "*Fees paid T. V.,*" and "*sent to Mr. O'K., deputy surveyor of Cambria county, December 8th, 1807—J. A., D. S., B. C.,* which I. P., the deputy surveyor of *Cambria* county, proved had been returned to him by W. O'K., the former deputy surveyor of the said county; that the words, "*Fees paid,*" appeared to him to be the handwriting of S. W., formerly deputy surveyor of *Bedford* county, but the witness never saw him write, and knew his handwriting only by comparison, and that the rest of the indorsement was in the handwriting of J. A., formerly deputy surveyor of *Bedford* county, was certified that he sent it to C. W., but did not say where he found it, or that it had ever been in the office of *Bedford* county, is not evidence. *Vickroy v. Shelley.* xiv. 372
368. If notice be given, that a deposition will be taken at a certain house in the township of N., in the county of B., and nothing more appears than that it was taken in the county of B., it cannot be read in evidence, unless the adverse party attended, which cures the defect. *Ibid.*
369. A connected draught of eleven tracts of land, which came from the office of the surveyor general, by whom it was certified, that "it was a connected draught of eleven tracts of land, situate on the waters of *Otter Creek* and surveyed on warrants granted to the persons whose names are written on the plots respectively, all dated the 23d of *July*, 1773, except that to R. I., which is dated the 22d of *July*, 1794, is not evidence to make title to the land in dispute; but it is evidence to show that the survey, under which the plaintiff claimed, did not interfere with others. *Ibid.*
370. In ejectment, the plaintiff made title to No. 1028, in the Fifth Donation District, and the dispute being about its locality, after having examined several witnesses, the object of whose testimony was to prove that the tract in possession of the defendant was No. 1028, offered in evidence the record of an ejectment brought by one M. against the plaintiff, and the recovery of another tract of land, on which the plaintiff lived, and claimed as No. 1028: *held*, that the record was not evidence of any particular right. But evidence having been given on the cross-examination of one of the plaintiff's witnesses, of the plaintiff's residence on the land which M. recovered from him, and that he continued in possession of that tract as No. 1028, and the witness having testified, that as far as he knew, he had lived there ever since, and that he understood he was the tenant of M.: *held*, that the record became evidence for the purpose of explaining what had become of his possession of M.'s tract, and that he had by mistake seated himself upon it as No. 1028. *Moore v. Smith.* xiv. 338
371. After the sale of part of a tract of land to one who holds in severalty the part sold, the declarations of the vendor, in a dispute with a third person, are not evidence to affect the rights of the vendee. In order to affect a person by conversations or declarations made in his presence, they must be made to him in such a manner as requires him to deny, or, by his acquiescence, to admit them. Therefore where A., who claimed a tract of land, attended as chain-bearer, a jury of view, in a controversy between B. and C., conversations between B. and C. relative to the locality of the tract claimed by A. are not evidence against him. *Ibid.*
372. The record of a verdict for damages, to be released on the performance of a certain act by the defendant, where no motion for a new trial, or in arrest of judgment is made, but judgment is not entered

on the verdict, in consequence of the performance of the act required by the defendant, is conclusive as to the same matters coming directly in question in another suit, upon the parties and upon privies in blood, in estate, and in law, unless obtained by fraud and collusion. *Estep v. Hutchman.* xiv. 435

373. A conveyance made by persons authorized by the legislature to convey, is *prima facie* evidence of good title in the vendee, against all claiming under the vendor; and, where such conveyance has been made after a solemn trial and decision on material facts, it is as conclusive, as if made by a person in full life.

Ibid.

374. A sworn copy of the entries in a justice's docket, is admissible in evidence, with the same effect as the original, if produced, would have. *Welsh v. Crawford.* xiv. 440

375. The relevancy or irrelevancy of evidence is a matter for the sound discretion of the court. *Harwood v. Ramsay.* xv. 31

376. Where the title of a part of the land, for the purchase money of which the suit is brought is defective, evidence of the situation of a mill-dam, race, &c. on the property is admissible to show the relative value of the part obtained, compared with that which is lost. *Fulweiler v. Baugher.* xv. 45

377. A paper will not be allowed to go to the jury, containing a statement of items, of some of which there is no proof.

The President of the Court of Common Pleas is not bound to file his reasons in writing for rejecting evidence.

Competency of evidence. *Morrison v. Moreland.* xv. 61

378. On a demurrer to evidence, the court are to take every fact sworn to against the parts demurring to be true, and cannot consider any testimony impugning the truth of the testimony against him. *Feay v. Decamp.* xv. 227

379. In a suit against several administrators, one of the defendants, examined as a witness by the plaintiff's without objection, cannot be permitted to state his belief that the defendants were indebted to the plaintiffs, founded on what the plaintiff's, testator had told him. *Scully v. Wallace.* xv. 231

EXCEPTIONS.

See REFEREES.

EXCEPTIONS, BILL OF,

1. The court is not bound to suspend the trial of a cause until a bill of exceptions is drawn in form and sealed. A note in writing made at the time the exception is taken to be reduced to form afterwards, is sufficient. *Query*, Whether the conduct of the court in such a matter is the subject of a bill of exceptions. *Stewart et al. v. Huntingdon Bank.* xi. 267

EXECUTION.

See ADMINISTRATOR, 16. AMENDMENT, 11. BAIL, 4. BOND, 7. ERROR, 36. ESTATE TAIL. INSOLVENT LAW, 1, 2, 3, 4. JUDGMENT, 3, 6, 41, 42, 57, 58. LEVARI FACIAS. LIBERARI FACIAS. MORTGAGE, 2, 13. PRACTICE, 17, 18, 19, 25. SHERIFF. SHERIFF'S SALE. TURNPIKE COMPANY, 1.

1. A *fi. fa.* was issued and a levy made on land which was extended. The court below, on motion set aside the inquisition and extent. Sometime afterwards an *alias fi. fa.* was issued, by virtue of which the *same land* was levied on and sold. *Held*, that having laid the second execution on the *same land*, the plaintiff had not in *substance* relinquished the former execution, and that these proceedings were valid. The court however would, on motion, relieve the defendant from unnecessary costs. *Miller v. Milford.* ii. 35
2. It is a matter of course in reversal of an execution executed, to award restitution of money levied. *Cassel v. Duncan.* ii. 57
3. If an execution be issued within a year and a day after judgment, an *alias* execution may be sued out at any time afterwards without a *scire facias* to revive the judgment, though the first writ was not returned, provided continuance by *vice comes non misit breve* be entered. *Lewis v. Smith.* ii. 142
4. A levy upon a part of the goods in a house in the name of the whole is a good levy upon the whole. ii. 142
5. Personal property is bound from the time the execution is delivered to the sheriff. ii. 142
6. If a levy be made upon goods which are suffered to remain in the defendant's possession several years, they are not protected from a subsequent

- execution, unless the levy be returned before the subsequent execution delivered to the sheriff. ii. 142
7. A collateral agreement made by the defendant's with the plaintiff's attorney, to be answerable for goods levied on by the marshal, and remaining in the defendant's hands, vests no property in the marshal. ii. 142
8. A payment by the sheriff to an administrator of the surplus money remaining in his hands on an execution against such administrator, which had been levied on real estate, without objection previously made by the heir, is legal. *Commonwealth for the use of Moore v. Rahn.* ii. 375
9. The court, on application of the heir in such case, before the money paid over, would order it to be paid into court, subject to its disposal. ii. 375
10. But the heir cannot recover it again from the sheriff after he has paid it to the administrator without notice. ii. 372
11. A *levari facias* issued several years after a judgment without a *sci. fa.* to support it is not void, but voidable only. *Vastine v. Fury.* ii. 426
12. The sheriff on a *levari facias* at the suit of A., sold lands to B., but afterwards at the instance of A's. attorney returned them unsold for want of buyers, on account of B's. default of payment, and sold them to A. on a second *levari.* Held, that the court in which the executions issued, had a right before the acknowledgment of the sheriff's deed, to confirm the first sale and set aside the second. ii. 426
13. The lien of a *testatum* execution against lands issued from a Court of Common Pleas, commenced at the time the writ is delivered to the sheriff. The duration of the lien is not however indefinite. It continues during the progress of proceedings to effect a sale; but the plaintiff may suspend the sale and retain his lien, provided he continues his process in such a manner as to give public notice that he means to hold the land, which may be done by issuing writs of *venditioni exponas*, from term to term, and delivering them to the sheriff to whom they are directed. *Cowden v. Brady and others.* viii. 505
14. After a *fi. fa.* has been levied on real property which has been condemned, the plaintiff cannot abandon these proceedings, and take out a *ca. sa.* without the leave of the court. *Bank of Pennsylvania v. Latshaw.* ix. 9
15. Where a defendant entered bail to entitle himself to a stay of execution under the provisions of the act of the 21st of March, 1806, and the plaintiff after the expiration of the *cesset*, issued a *fieri facias* and levied on the defendant's real estate, and on the return of the writ, issued a *scire facias* against the bail upon his recognizance, held, that the plaintiff was not bound to make his election between the defendant in the original action and the bail, but might pursue his remedies against both or either, though he could receive but one satisfaction. *Patterson v. Swan.* ix. 16
16. If the sheriff return to a *levari facias*, "struck off for a certain sum, and the sheriff could not make a title therefore remains unsold" the plaintiff may issue a new execution. *Peddle v. Hollingshead.* ix. 277
17. The privilege of a stay of execution under the appraisement act of the 28th of March, 1820, expired with that act, and existed afterwards in relation to executions issued while that act was in force only as modified by the act of the 27th of March, 1821. *Ibid.*
18. If the legislature give an indulgence of a stay of execution to a debtor, it may afterwards modify or withdraw it. *Ibid.*
19. The court will not, on motion to set aside a *fi. fa.* inquire into the title of a third person who claims the land levied on, but will leave him to his ejectment. *Harrison v. Waln.* ix. 318
20. Nor will the court in such case inquire into the existence of liens on the land; though they would apply the proceeds to them, if valid, when the money is brought into court by the sheriff. *Ibid.*
21. If a subsequent judgment creditor buy in a prior mortgage and judgment; and under the latter levy on lands of the debtor not included in the mortgage, with a view to the payment of his own judgment out of the mortgaged property, the court will not interfere on motion, to relieve one claiming the land levied on under a voluntary conveyance by directing the creditor to proceed against the mortgaged premises,

- though it seems they would in favour of a purchaser for a valuable consideration. *Ibid.*
22. If after a recognizance entered into for a stay of execution, the plaintiff issue a *fi. fa.* against the defendants in the original suit, within the time of stay allowed by law, and obtain part of the debt from one of the original defendants, under a menace of levying the execution, this does not discharge the recognizance.
- A *fi. fa.* issued within the period of the stay, after security entered, is a nullity, and trespass lies against the plaintiff or prothonotary for issuing it. *Milliken v. Brown.* x. 188
23. If an execution issue against several defendants and the assignee of one pay the amount thereof to the sheriff, who marks the execution satisfied, if such payment was in reality a purchase of the judgment the sheriff may correct the indorsement and proceed on the writ: but if the assignee had funds in his hands to pay the debt, and there are circumstances to show it was intended as a payment, the jury may so consider it, and the sheriff's proceeding afterwards on the writ, will be considered a trespass. *Kuhn v. North.* x. 399
24. Where bail for an appeal from an award of arbitrators was entered within sixteen days, and no exception to it was taken until seven years afterwards, and the appellant, when he knew of the exceptions, offered additional and unexceptionable bail, which the opposite party refused and issued an execution, held, that the execution was erroneous. *Davis v. Black, Administrator.* xii. 327
25. If an execution has been issued before the stay of execution is expired, it is irregular but not void, and its validity cannot be called in question by another execution creditor who sues the sheriff for the proceeds.
- A sheriff who has money in his hands by virtue of a sale under an execution, but who is tied up from paying it over by a rule of court, is not liable for interest during such period: even though the purchasers have not paid him and may be liable to him for interest. *Stewart v. Stacher.* xiii. 199
26. A sheriff's return to a *fi. fa.* of debt and costs paid, made two years out of time, and not less than a year after a suit commenced, in which its effect is material, is not conclusive.
27. If the plaintiff, in an execution levied on goods, forbear to proceed against the defendant, on the promise of a third person to pay the money to the plaintiff, the receipt of part of the money from the defendant after the promise is broken, and giving two weeks' time to pay the remainder, does not discharge the promise.
28. In a suit on such promise, under the above circumstances, evidence offered by the defendant that the surplus of certain moneys raised by an execution against him and another, jointly, was paid to the sheriff in discharge of the plaintiff's execution, is admissible. *Weidman v. Wetzel.* xiii. 96

EXECUTOR.

- See ACTION, 8, 10, 12. APPRENTICE, 7, 8. ARBITRATION, 13. EVIDENCE, 39, 40. PARTITION, 4. SCIRE FACIAS, 6. SET-OFF, 15, 23, 24. WILL, WITNESS, 12, 31, 34, 65, 76.
1. A settlement of the accounts of executors in the Orphans' Court, made after the commencement of an action against them for a legacy, is not conclusive in such action. *Miller v. Young.* ii. 518
- Query, Whether such settlement would have been conclusive, if it had been made before the commencement of the action. ii. 518
2. An executor is liable in respect to all the assets which come into his hands, whether they arise in the county in which letters testamentary are granted, in another county or state, or even in a foreign country; and if letters testamentary be granted in another state, as well as in this, a suit may be maintained here before the settlement of any administration account in the other state. *Swearingen's executor v. Pendleton's executrix.* iv. 389
3. If an executor, after the expiration of a year, apply the assets in his hands to the payment of legacies or distributive shares to the prejudice of a creditor of whose claim he had no notice, it is a *devastavit.* *Ibid.*
4. In an issue joined on the plea of *plene administravit*, which was found for the plaintiff, the jury besides finding against the defendant on the issue joined, found also, that he had wasted the goods which came to his hands; and the court below ordered judgment for the whole amount of damages and costs to be entered *de bonis testatoris si, &c., et si non de bonis propriis* of the

defendant. *Held*, that no issue being joined on the wasting of the testator's goods what the jury found on that subject, was unauthorized, and that consequently the judgment was erroneous. *Ibid.*

5. When the verdict is for the plaintiff, on a plea of *plene administravit*, the judgment for all but the costs is *de bonis testatoris*. If, however, on such a judgment a *fieri facias* be issued, it is the duty of the sheriff, unless goods of the testator be shown by the defendant to return a *devastavit*, which the defendant is estopped from denying, because the verdict is conclusive that assets were in his hands at the commencement of the suit. *Ibid.*

6. Devise of real estate to four persons named in the will as executors, to rent the same and distribute the profits among the testator's wife and children. Afterwards three of the executors refused the trust; one of them died: the other two renounced by an instrument in writing after the commencement of the suit, but were examined as witnesses and declared, they had from the first refused the trust. *Held*, that the other executor alone might recover in ejectment. *Jones v. Maffet.* v. 523

7. The 5th section of the act of the 21st of March, 1806, "to regulate arbitrations and proceedings in courts of justice," extends to executors and administrators. *Dixon and others, administrators, &c. v. Sturgeon and others, executors.* vi. 25

8. Where a will has been admitted to probate by the register, and the executor has acted under it, although the will be afterwards revoked, the accounts of such executor may be filed before the register and presented to the Orphans' Court, and they are bound to make a decree in respect to them. *Case of William Huff's estate. Peebles Appeal.* xv. 39

9. Where executors purchase bank notes at a discount, and with them pay a debt due by the testator to the bank, the estate shall have the benefit of such discount and not the executors. *Case of Heager's executors.* xv. 65

10. Where the accounts of executors filed on citation by guardian of infants were referred, and the Orphans' Court confirmed the report of referees, *held* that the decree of confirmation was subject to appeal, and might be reversed for error in

law contained in the report appearing on the answers and admissions of the executors before the referees. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

See ABATEMENT, 2. ACTION, 8, 10, 12. AFFIDAVIT OF DEFENCE, 3. ARBITRATION, 13. DEVISE, 25. ERROR, 89. EVIDENCE, 39, 49. FEIGNED ISSUE, 4. FORMER RECOVERY, 2. HEIR. LEGACY. ORPHANS' COURT. PARTITION, 4. POWER, 1, 2. PLEADING, 54, 55, 56. SCIRE FACIAS, 6. SET-OFF, 15, 23, 24. WITNESS, 12, 31, 34, 65, 76.

1. A confession of judgment, by an executor or administrator, is an admission of assets to the amount of the debt. *Griffith v. Chew.* viii. 17

2. If the obligee, in a joint and several bond, appoint one of the administrators of one obligor, having assets, to be one of his own executors, the debt is paid, and the surviving obligor discharged. *Ibid.*

3. The law is the same, where the obligee, in his lifetime, obtains several judgments against the surviving obligor, and the representatives of the surviving obligor. *Ibid.*

4. An administration bond, conditioned for the return of an inventory within one month, and the settlement of an account within one year, is forfeited, if the inventory be not rendered within one month, and the account settled within one year, though there be no citation. *Commonwealth v. Bryan and another.* viii. 128

5. Such inventory and account need not be final; but the administrator may afterwards file another inventory of goods coming to his hands since; and on rendering an account, so far as the nature of the case admits, pray time to file another; which will always be granted. *Ibid.*

6. The judgment on the bond stands as a security; but the party cannot take out an execution, till he has proved his damages, after taking out a *scire facias*. *Ibid.*

7. The limitation of seven years, in the second section of the act of the 4th of April, 1797, does not apply to all sureties in administration bonds, but only to cases where *nulla bona* has been returned to an execution against an executor or administrator, that is, an execution against the estate of the testator or intestate,

- in the hands of the executor or administrator. *Ibid.*
8. A. devised his real estate to his wife, during her widowhood, with directions to his executors to sell it at her death, and divide the proceeds of sale equally among his children. The widow and children came to an agreement to sell in her lifetime; and in consideration of her joining in the deed, she was to receive during her life, the interest of one thousand pounds, which was to remain charged on the land, and was, immediately after her death, to be paid to the children. *Held*, That the interest which accrued, between the day on which the interest was regularly payable, and the day of her death, was payable to her administrator. *Sweigert v. Frey, Administrator of Berk.* viii. 299
9. An administrator is not entitled to credit in his administration account, for any money expended on account of the real estate, or the maintenance of the children. *M'Kinney, guardian of M'Kinney, v. Watson, administrator of Barber.* viii. 347
10. In all cases of promises, express or implied, made to or by an administrator, after the death of the intestate, the action lies by or against the administrator *personally*. Where, therefore, an administrator gave a receipt, in that character, for money paid to him by mistake, it was *held*, that the action to recover it back, must be against him *personally*. *Grier v. Huston.* viii. 402
11. And if the administrator, in such a case, has administered the money in payment of debts of the intestate, *without notice of the mistake*, he may plead this matter specially, and if he can prove it, and that the estate of the intestate is insolvent, he is protected. *Ibid.*
12. If the creditor makes his debtor executor, the debt is still assets as far as respects the creditors of the testator, or a residuary legatee. *Pusey v. Clemson.* ix. 204
13. No rule can be established as to the amount of commissions of executors, that will suit every case. In common cases, five per cent. has been fixed as the standard by common opinion and understanding, but in the discretion of the court, it may exceed or be less than that sum. *Ibid.*
14. When the value of the estate was near 100,000 dollars, and the executors had little trouble or hazard, the care of law suits being trusted to counsel, who were paid by the estate, and there being more than sufficient to pay debts, and the receipts by the executors were in large sums of money, the court held three per cent. a reasonable allowance. *Ibid.*
15. If an executor make a compromise, which is intended for the benefit of the estate, and has actually been for its benefit, he ought not to be charged with the debt. *Ibid.*
16. Twelve dollars allowed to executors, as a fee paid to an attorney, for stating and preparing their accounts, but nothing beyond that for advice, as to the mode of stating it. *Ibid.*
17. Commissions of executors fixed at three per cent. upon settling an account to the amount of 37,000 dollars, which principally consisted of bank shares transferred to the legatees, though the executors were also to pay some annuities, clothe and educate children, and distribute some dividends of bank shares in charities, there being no evidence of the degree of trouble the executors had had in these respects. *Joseph Walker's estate.* ix. 223
18. The number of executors is not to make any difference in the rate of commission. If their trouble is unequal, a share of the commission ought to be assigned to each proportioned to his trouble. *Ibid.*
19. Commission should be paid for services when rendered, not by anticipation for such as may be done in future. *Ibid.*
20. One devised the residue of his real and personal estate, after payment of his debts, to the discretion of his executors, to distribute in such manner as they might think proper, and appointed three executors, all of whom died indebted to the estate, without making any distribution. *Held*, that the Register's Court might, in its discretion, appoint the son of the surviving executor, who was an administrator to his father, administrator *cum testamento annexo*, he being of fair character, and having given good security, and no claim being made by any next of kin, nor opposition by the commonwealth under a claim by escheat, nor by creditors. *Case of Richard Neave's estate.* ix. 187
22. A person taking out letters of ad-

- ministration in *Pennsylvania*, may be sued in *Tennessee*, for a debt due by the intestate. *Evans v. Tatem*. ix. 252
23. The court refused to allow to an administrator the sum of two hundred and seventy-five dollars eighty-six cents, charged against the estate of the intestate, for mourning for the family, as against those of the next of kin who had received no part of the mourning. *Flintham's Appeal*. xi. 16
24. The administrator was charged with interest on the distributive shares of minors, from the time of filing his accounts in the register's office, notwithstanding the minors had not, until long afterwards, any guardian legally authorized to receive their respective shares, and the accounts were a long time before auditors, and the amount to which the minors were entitled could not be ascertained, until the final decree of the Orphans' Court. *Ibid*.
25. Where two administrators, neither of whom were next of kin to the intestate, settled a *joint* account, on which they charged themselves with the amount of the inventory they had previously filed, which embraced a bond and book debt due to the intestate from one of the administrators; the court refused, after the lapse of four years, to discharge the co-administrator from his liability for this debt, because it had been discovered since the settlement of the account in the Orphans' Court, that the obligor was insolvent at the time of the intestate's death. *Metz's Appeal*. xi. 204
26. The proper time to claim an allowance, for bad or doubtful debts, is when the administration account is settled. *Ibid*.
27. How far administrators will be allowed in the settlement of their account, payments made by them for the funeral expenses, boarding, and lodging, &c., of the intestate. *Ibid*.
28. On the discontinuance of a suit brought by an executor or administrator, the plaintiff is not liable, *de bonis propriis*, for the costs of the opposite party; but he is for the fees of the officers of the court, for services rendered him. *Musser et al. Administrators of Charles, v. Good*. xi. 247
29. Where a testator devised all his estate, real and personal, to his wife, during her natural life, after *discharging all his lawful debts*, and from and immediately after her decease, he gave and devised of the same pecuniary legacies to different relations, the residue of his estate, whatever it might be, to be equally divided between two other relations, or the surviving heirs of each: *held*, that the will gave no power to the executors to sell the real estate. *Clark v. Riddle, surviving Executor of Dougherty*. xi. 311
30. Of the right of creditors and legatees to follow assets which have been collusively parted with by an executor; of the remedy in such cases, and of the power of an executor over the assets. *Petrie v. Clark et al*. xi. 377
31. Of an executor pledging the assets of his testator, as a security for an *antecedent* debt of his own, to one who is ignorant of the misappropriation of the property. *Ibid*.
32. A promissory note was indorsed in blank, to executors for goods purchased of them, which were part of the assets in their hands. One of the executors, without the knowledge of the other, being indebted to the plaintiff, on his own promissory note of nearly the same amount, after his own note became due, made an arrangement with the plaintiff, by which his own note was taken up by a new note, and the note which had been received by the executor for the goods of the testator, was handed over, with the blank indorsement of the payee, as a collateral security for the payment of this debt; the plaintiff being entirely ignorant of the circumstances under which the latter note came into the hands of the executor. *Held*, that the plaintiff, not being a holder for a valuable consideration, was not entitled to recover the amount of the note. *Ibid*.
33. But, it *seems*, that if he could show that time was given in consideration of obtaining the note in question as a security for a debt, and in consequence the debt was lost, it would be otherwise. *Ibid*.
34. An administrator, and his surety are not liable on their bond for the act of the former in confessing a judgment on which the real estate of the intestate is sold, and applied to the payment of debts which are posterior in order to those which

would have been paid, had the property been brought into a course of administration. *Reed et al. v. The Commonwealth.* xi. 441

35. No contract arises upon a *devastavit*, which will support an action against the executor, personally. *Wilson v. Long.* xii. 58

36. No contract, express or implied, arises between the executor and a legatee of the testator. *Ibid.*

37. One administrator cannot sue a co-administrator on a bond from the latter, to the intestate. *Simon's Administrator v. Albright.* xii. 429

38. Nor will it enable him to sue, if he assign such bond to a third person, (a creditor of the intestate,) and then obtain an assignment from him. *Ibid.*

Query, What remedy there is? *Ibid.*

39. In a suit against administrators, an arbitration bond, given by the defendants in their individual capacity, is not evidence. *Mahaffy v. Mahaffy.* xiii. 163

40. An action for breach of promise of marriage, does not survive against executors.

Query, Whether it would survive where such breach of promise occasioned an immediate injury to property, or where special damage is averred and proved. *Lattimore v. Simmons.* xiii. 183

41. Testator orders his executors, after the death of his widow, to sell his real and personal estate, and divide the money equally amongst his four children. On a sale of land being made by an administrator *de bonis non*, after the death of the widow, such administrator is entitled to receive the money, and not a creditor who had obtained judgment against a son before the sale. *Allison v. Wilson's Executors.* xiii. 330

EXECUTOR DE SON TORT.

The lands of an intestate cannot be sold on a judgment against the executor *de son tort*. *Nass v. Vanswearingen.* vii. 192

EXECUTORY DEVISE.

See LEGACY.

Money may be the subject of an executory devise; and it is not too remote if the limitation, after failure of issue is restricted to the death of the first taker. *Scott v. Price.* ii. 59

EXEMPTS.

See MILITIA.

EXONERETUR.

See BAIL, 8.

EXPORTATION.

See INSURANCE.

EX POST FACTO LAW.

See ACT OF ASSEMBLY, 9.

EXTINGUISHMENT.

1. A simple contract debt, for work done at the instance of the defendant's wife, is not extinguished by a judgment obtained by the plaintiff for the same debt against the wife, by another name. *King v. Bosarth.* ii. 275

2. If a note be taken by a creditor, who indorses the note, and gets it discounted at bank for the benefit of the drawer, and afterwards has to take it up again, after a protest, this is not such a parting with the note as makes it an extinguishment of the preceding debt. *Kean v. Dufresne.* iii. 233

EXTORTION.

See FEES, 12, 13.

FACTOR.

See AGENT, 1, 2, 3, 4.

If a principal, in a letter to his factor, express a wish to have a certain thing done, but afterwards leave the matter to the discretion of the factor, a non-compliance with the wish thus expressed is not a breach of orders, which will make the factor liable. *Harper et al. v. Kean.* xi. 280

FAIRMOUNT.

See SCHUYLKILL RIVER.

FEES.

See COUNTY COMMISSIONERS, 1. JURY, 2. JUSTICE, 20. OFFICER, 1. REGISTER OF WILLS, 1. SHERIFF, 9, 10, 12, 13, 14.

1. The 26th section of the fee bill of the 28th of March, 1814, does not take away the right to compensatory fees, for services performed before the passage of that act, where such fees were by law allowable. *Levy v. the Commissioners of Northumberland County.* iv. 291

2. Fees for every service performed by an officer, whether mentioned in the table of fees which existed prior to the act of 1814, or not, cannot be allowed, but it seems that some compensatory fees sanctioned by an-

cient usage may be legally charged.

Ibid.

3. Prothonotaries, registers, recorders and clerks of the Orphans' Court are not entitled to be paid by their respective counties for office rent or fuel, prior to the erection of the public offices, nor for fuel since their erection. *Lyon v. Adams.* iv. 443

4. Prothonotaries are entitled to be paid by the county the expense of giving notice by public advertisement, when the acts and journals of the assembly came into their hands, and also the price of the book in which receipts are directed to be taken from each person, to whom they deliver a copy of the acts or journals: but they are entitled to no other allowances in relation to this business. *Ibid.*

5. Prothonotaries are entitled to no fees for receiving and filing the returns of district and general elections, and transmitting copies of the said returns to the secretary of the commonwealth; nor for performing the same services in relation to the election of President and Vice-President of the United States; nor for filing the oaths of the persons elected county commissioners, and making out and delivering to the persons so elected, certificates agreeably to law; nor for entering the appointment of auditors for settling the public accounts of the county; but they are entitled to fees, for filing the reports of the auditors. *Ibid.*

6. Prothonotaries are not entitled to any fees for entering the appointments of agents of the general election, for the different election districts; but they are entitled to fees, for giving notices under seal to the agents appointed. *Ibid.*

7. Prothonotaries cannot recover of the county, fees in suits brought on forfeited recognizances, at the time when the money recovered in such suits was to be paid into the treasury of the commonwealth. *Ibid.*

8. The commonwealth is not liable for the sheriff's fees for serving process on forfeited recognizances brought in the name of the commonwealth. *Commonwealth v. Johnson.* v. 195

9. The accounting officers are not authorized to allow claims for such fees to be charged as a set-off against monies received by the

sheriff for the use of the commonwealth. *Ibid.*

10. If on the return of an inquisition to the Orphans' Court by which the estate of an intestate is divided, the heirs refuse to take, and the court order a sale, part of the purchase money to be paid by instalments, and several sales take place, and recognizances are taken by the clerk according to the practice in that court, to each heir for each instalment: *Query*, Whether the clerk is entitled to a fee of twenty-five cents for each recognizance; to a fee of three dollars for each share into which the issue is divided; or to a fee of four dollars on each sale? *Ramsey v. Alexander.* v. 338

11. He is entitled to a fee of twenty-five cents for writing each advertisement of sale when ordered by the court, and to a fee of twenty-five cents for recording each draft. *Ibid.*

12. Administrators cannot maintain an action under the act of the 28th of March, 1814, to recover penalties for illegal fees, taken by an officer from their intestate in his lifetime, though they may recover back the sums paid beyond what was due. *Reed v. Cist.* vii. 183

13. *Query*, Whether they could sue if the act had given cumulative damages to the party grieved. *Ibid.*

14. When the fees of a particular officer are mentioned in the fee bill of 1814, he can charge no other fees for any service whatever than those specified in the act. But where the officer is not mentioned in the act, he may receive fees under other acts of assembly. *Bussier v. Pray.* vii. 447

15. The clerk of the Quarter Sessions is not entitled to a fee of eighteen and three quarter cents for each certificate given to a witness for the commonwealth, of his attendance on an indictment, on which the county is to pay the costs, when such certificate is not given at the request of the county commissioners, though they refuse to pay the witnesses without it. *The Commonwealth v. The Commissioners of Philadelphia County.* viii. 64

16. The county is not obliged to pay the Prothonotary's fees accruing in suits on forfeited recognizances since the act of the 24th of March, 1818, appropriating the monies arising from fines and forfeitures to county purposes, where such fees cannot be

collected from the defendants. *The Commonwealth v. The Commissioners of the County of Philadelphia.*

viii. 151

17. Of the distinction between fees and costs. *Musser et al. administrators of Charles, v. Good.* xi. 247

18. The remedy of the prothonotary for his fees, is against the party for whom the services in a suit are done, in the same manner as for other debts.

Where the amount does not exceed one hundred dollars, an action may be brought before a justice.

A prothonotary has no right to issue an execution for his fees, as there is no judgment rendered for him.

The fees are not chargeable to the attorney, unless he becomes security.

The plaintiff in error, whether plaintiff or defendant below, is to be looked to for the prothonotary's fees on affirmation.

The prothonotary cannot recur to the recognizance given by the plaintiff in error for his fees, should the plaintiff in error prove insolvent: but, if the recognizance is sued, the court will take care that these fees are secured, so far as they are covered by the recognizance.

Where the judgment is reversed in the Supreme Court, and no *venire facias de novo* awarded, the prothonotary of the Supreme Court cannot direct the prothonotary below to issue execution for his fees. *Moore v. Porter.*

xiii. 100

FEE SIMPLE.

See ESTATE, 3, 4. ESTATE TAIL, 1, 2. DEVISE, 22.

FEIGNED ISSUE.

1. A writ of error lies on a judgment of the Court of Common Pleas, in an issue framed under the supplement to the act for offering compensation to Pennsylvania claimants of certain lands within the seventeen townships, &c., passed the 20th of March, 1810, notwithstanding the act declares, that the judgment and decree of that court shall be final. *Moore v. Albright. The same v. Cook.* iv. 231

2. In framing such an issue the Court of Common Pleas are to proceed according to their own judgment; and it is not material who are the parties to the issue provided the matters in controversy be fairly brought to trial. *Ibid.*

3. The jury in an issue so framed, are to find generally for the plaintiff or

defendant, and a verdict finding the sum due to each party is bad. *Ibid.*

4. An administrator having relinquished his office, and an administrator *de bonis non* been appointed by the Orphans' Court, who directed an issue to ascertain whether the former administrator had in his hands any assets of the intestate, and whether he was liable to the administrator *de bonis non*, for any property which may have come to his hands as administrator, the parties entered by agreement, an amicable action for that purpose, which was tried and the jury found a verdict for the plaintiff for a certain sum, for which judgment was entered. The court reversed the judgment, because it was contrary to the agreement of the parties. The matter in issue should have been found, and a certificate transmitted to the Orphans' Court. *Ferrey, late Administrator of Hinds, v. Moore, Administrator de bonis non of Hinds.* viii. 345

5. A feigned issue is to inform the conscience of the court as to disputed facts, and is to be moulded as their discretion dictates. And the mode in which it is done by the court below is not the subject of a writ of error, and cannot be judicially decided on by this court. *Neff v. Barr.* xiv. 166

FEME COVERT.

See ACKNOWLEDGMENT, 1, 2, 3. DEVISE, 20. HUSBAND AND WIFE. JUSTICE, 28, 29. RELEASE, 2.

FEME SOLE TRADER.

A *feme sole* trader within the meaning of the act of assembly of the 22d of February, 1718, may be sued without naming her husband, for all debts contracted, either in the course of her trade, or for the maintenance of herself and her children, whether the same be by simple contract or by *specialty*. *Burke v. Winkle.* ii. 189

FERRY.

The act of assembly of the 11th of March, 1784, authorizing John Sumrall to establish a ferry over the Youhiogany river, did not vest in him a right to land upon the landing of any person without their consent. *Cooper v. Smith.* ix. 26

FIERI FACIAS.

See ERROR, 3, 4.

FISHERY.

See SCHUYLKILL NAVIGATION COMPANY. SCHUYLKILL RIVER. RIVERS.

FORBEARANCE.

See ASSUMPSIT, 9.

FORCIBLE ENTRY.

See ERROR, 21. INDICTMENT, 1.

1. On a traverse of an inquisition of forcible entry, held before two justices of the peace, and a finding of guilty by a second jury, the justices have no power to assess damages. *Commonwealth v. Stoever.* i. 480
2. In an indictment for forcible entry, it is sufficient to describe the premises as a "certain close of two acres of arable land, situate in S. township, in the county of H., being part of a large tract, adjoining lands of A. B., and C. D." *Dean v. The Commonwealth.* iii. 418
3. If an indictment for forcible entry and detainer, state merely a naked possession in the prosecutor, without stating what estate or interest he had in the premises, it is not sufficient to authorize an award of restitution. *Burd and others v. Commonwealth.* vi. 252
4. An indictment for forcible entry and detainer, stated that A. was lawfully and peaceably seised of a dwelling house, and that B., the son of A. was lawfully in possession of the same; and laid the entry to have been made into the dwelling house, and the possession of the said B. It then stated that the defendants expelled the said B. from the possession of the said house, and disseised the said A., and laid the detainer against B. only. *Held*, that it was error to award restitution to A.

Ibid.

FOREIGN ATTACHMENT.

1. The court will not order the garnishee, in a foreign attachment, to answer interrogatories, filed under the act of 28th of September, 1789, before the return of a *scire facias* against him. The interrogatories may be served with a *scire facias*, and if the garnishee makes any delay in answering them, after the return of the writ, the court will make such order as will accelerate the plaintiff's recovery. *Crammond v. Trustees of the late Bank of the United States.* iv. 147
2. The court dissolved a foreign attachment, because the plaintiff's affidavit stated, that the defendant, in consideration that the plaintiff would forbear to sue him for six months, promised to pay, without averring that he did forbear. *Mollet v. Fonsera.* iv. 543
3. It is not necessary that the plaintiff, in a foreign attachment, should, before the issuing of execution, give security for the restoration of the goods attached, if the defendant, within a year and a day, should disprove the debt. He has until the sale. *Pitch v. Ross.* iv. 557
4. The death of the defendant, in a foreign attachment, after final judgment, does not dissolve the attachment. But the plaintiff must give security to the representatives of the defendant, who, within a year and a day, may come into court, and proceed by writ of *scire facias*, *ad disprobandum debitum*, which puts the plaintiff to proof of his demand, and lets the representatives of the defendant into a full defence. *Ibid.*
5. The garnishee, after pleading *nulla bona*, to the *scire facias* against him, and proof to the jury of a debt due by him to the defendant, cannot, by paying the debt in court, make himself a witness to prove that the money was appropriated to other creditors before the attachment levied. *Wood v. Ludwig.* v. 446
6. Foreign attachment does not lie where the plaintiff's demand is founded in tort. *Jacoby v. Gogell.* v. 450
7. An affidavit by a plaintiff, in a foreign attachment, not swearing positively to a contract, but stating facts from which a jury might or might not infer a contract. *Held*, not sufficient, and the attachment quashed. *Ibid.*
8. An action of debt, on the act of assembly, is improper in a foreign attachment, and is erroneous. *Pancake v. Harris.* x. 109
9. The garnishee is not liable in *scire facias*, on a foreign attachment, where the *narr* is in assumpsit, till the plaintiff has issued a writ of inquiry; and this defect it seems, may be taken advantage of on the plea of *nulla bona.* *Ibid.*
10. Where a foreign attachment is laid for a smaller sum than is in the hands of the garnishee, he is not justified in withholding from his creditor more than sufficient to cover the debt claimed by the plaintiff in the attachment, the interest, which would probably accumulate, costs, and a libe-

ral allowance for expenses: if he does, he is liable for interest on all beyond. *Sickman v. Lapsley.*

xiii. 224

FORFEITURE.

See ENTRY, 2.

1. The plaintiff and defendant, and eight others, on the 13th of *April*, 1820, joined in the purchase of lottery tickets, to be paid for by instalments, according to an agreement in writing, as follows; namely, one dollar to be paid by each member at the time of subscribing, and one dollar on each and every ticket, weekly till paid for, at twelve dollars each ticket; any one subscriber, neglecting to pay his weekly dues for three successive weeks, to forfeit to the club his title to the tickets and instalments before paid. The plaintiff paid, on the 13th of *April*, one dollar; on the 27th of *April*, one dollar, and on the 13th of *May*, one dollar. On the 25th of *May*, a prize was drawn, and the money divided, excluding the plaintiff. *Held*, there was no forfeiture of the plaintiff's right to a share of the prize. *Stafford v. Walker.* xii. 190

2. A receipt of a weekly payment by a broker, not the agent of the parties, would not amount to a waiver of the forfeiture, if any had existed.

Ibid.

FORGERY.

1. An indictment, charging the defendant with altering and defacing "a certain registry and record, being and remaining as a public record, in the office of the surveyor general of this commonwealth, to wit, book F.," on the page of the said Book, "containing the list of returns made by the defendant, while acting as deputy surveyor," is a valid indictment for forging, under the act of 1700. *Ream v. The Commonwealth.*

iii. 207

2. Every registry or enrollment directed by law, and preserved for the use of the public, is embraced by this act of assembly. *Ibid.*

4. On an indictment for uttering a forged paper, purporting to be a bank note, with intent to defraud A. B., it is not necessary to prove the existence of the bank, unless the indictment avers that it was incorporated, or that the act was done with an intention to defraud such bank. *Commonwealth v. Smith.*

vi. 568

3. It is not necessary to prove that the

note is forged by the testimony of the president and cashier, whose signatures are alleged to be counterfeited. A witness, who has become acquainted with their handwriting, in the course of an official correspondence, is sufficient; and the case is strengthened, if the witness can state, that, from his knowledge of the paper, type, and whole appearance of the note, he believes it to be a counterfeit. *Ibid.*

4. To utter and publish a counterfeit note, of a private unauthorized banker, knowing it to be counterfeit, is an indictable offence. *Butler v. The Commonwealth.* xii. 237

FORMER RECOVERY.

See ELECTION, 7. EVIDENCE, 229.

1. Where a recovery has been had, in a suit in which the plaintiff counted for an entire sum, *c. g.* for the whole balance of purchase money, due on the sale of land, which was to be paid for by instalments, the record of such recovery is a conclusive bar to another suit brought on the same contract, to recover a sum which was included in the declaration in the first suit, and the plaintiff will not be permitted to prove that no evidence was given to the former jury in support of the latter claim. *Hess, Executor of Hess, v. Heeble.* vi. 57
2. A former recovery, in an action for money had and received, against an executor, by a widow, is only *prima facie* evidence that the whole amount, with which the executor then charged himself, in the settlement of his accounts, was recovered; the plaintiff may, in another action, recover monies received since the bringing of the former suit, though contained in the account, if they were not before recovered. *Wilson v. Hamilton.* ix. 424

FORNICATION AND BASTARDY.

See PAYMENT WITH LEAVE, 6.
SLAVE, 3.

FRANKLIN COUNTY.

See BRIDGES.

FRAUD.

See AGREEMENT, 17. ASSIGNMENT, 9, 10. ATTACHMENT, FOREIGN, 1, 2, 3, 4, 5. BANKS, 10, 11, 12, 13, 14, 15, 16, 17. CONFIRMATION. EJECTMENT, 33, 74. ERROR, 108.

- EVIDENCE, 103, 188, 208. INFANT, 9. INSOLVENT DEBTOR, 4. INSOLVENT LAW, 4. LIEN, 8. MORTGAGE, 2. PATENT.
1. When a contract is in itself fraudulent, it is void; and cannot be confirmed by any subsequent declarations or acts, by which its fairness is acknowledged. *Duncan v. McCulloch*. iv. 483
 2. If the husband give a fraudulent mortgage, to defeat the wife's right of dower, it is void as to that right, and as to creditors. *Killinger v. Reidenhauer, Administrator of Smith*. vi. 531
 3. But the mortgagor cannot set up the fraud, nor his representatives after his decease. *Ibid*.
 4. If an administrator purchased the land of his intestate, at sheriff's sale, on a judgment recovered for an alleged debt of the intestate, in an ejectment afterwards brought by the heirs of the intestate, who allege the judgment to be fraudulent, if it do not appear that the debt was *bona fide*, and if the administrator had assets to pay it, they may recover the land against the administrator on the ground of fraud, without previously tendering the money paid by him, or the value of his improvements. *Riddle v. Murphy*. vii. 230
 4. After a levy upon real property, in possession of the debtor, he cannot, with a view to defeat the creditor, transfer the possession to the real owner, who must pursue his title by an ejectment against the purchaser at sheriff's sale. *Stahle v. Spohn*. viii. 317
 5. A father agreed to sell real estate to his son. A deed was prepared, but not executed, possession delivered, and part of the purchase money paid. The son then sold to his brother, who went into possession, and paid the money. The estate was afterwards sold by the sheriff, as the property of the latter; but between the levy and the sale, the father got into possession. In an ejectment, by the purchaser against him, it was *held*, that it was incumbent on him to show that his possession was free from fraud. *Held*, also, That the declarations of the sons were not evidence to affect the purchaser. *Ibid*.
 6. A deed, executed when the grantor is indebted more than the amount of his whole estate, and just after one creditor has obtained judgment against him, containing, in the first place, an absolute conveyance of property, in consideration of which, the grantor agrees to pay a valuable consideration, but followed by a proviso, by which he is permitted to relinquish the bargain at any time he may choose, and on re-delivery of the property, receive from the grantee any money which he may have expended on it, is fraudulent against creditors. *Shannon and others v. The Commonwealth, for the use of Lazarus*. viii. 444
 7. Where a parol transfer of property is attended with suspicious circumstances, the jury are the proper tribunal to determine, whether it was fraudulently entered into, with a view to defeat creditors. *Ibid*.
 8. Fraud in fact, is for the jury: legal fraud for the court to determine. *Dornick v. Reichenbach*. x. 84
 9. A purchaser of land at sheriff's sale, buys at his own risk, and acquires the interest which the defendant in the execution had, and no more. Where, therefore, he has paid the purchase money, he cannot recover it back, in consequence of a defect of title, in an action for money had and received, against the plaintiff in the execution, without proving express fraud in the plaintiff. *Weidler v. The Farmers' Bank of Lancaster*. xi. 134
 10. A deed, duly recorded, by which the defendant in the execution had conveyed the premises to a third person, before the judgment was obtained, under which the sale took place, affords, when standing alone, no presumption of fraud, and is, therefore, inadmissible in evidence. *Ibid*.
 11. Nor can a mortgage, executed by the person from whom the defendant in the execution purchased, and under which the property was afterwards sold, be received as evidence of fraud. *Ibid*.
 12. The sheriff is not the agent of the plaintiff in the execution, who is not responsible for misrepresentations made by the sheriff at the time of sale, respecting the title, unless it be shown that he acted under the instructions of the plaintiff. *Ibid*.
 13. A petition, presented by the purchaser to the plaintiff in the execution, setting forth the mistake under which he bought, and the misrepresentations of the sheriff, and request-

- ing that what he has paid may be refunded, which was refused by the plaintiff, is not evidence of fraud in the plaintiff, in an action brought against him to recover back the purchase money. *Ibid.*
14. Notwithstanding the rejection of the testimony, offered by the plaintiff, to prove fraud, it is competent to the defendant to give in evidence the condemnation of the property under his execution, the printed or written conditions of sale, the sheriff's deed to the purchaser, and the payment by the latter, of the purchase money, in order to show the fairness and regularity of the proceedings. *Ibid.*
14. Where the court, on the application of the creditors of the defendant, opens a judgment for the purpose of trying whether the bond, on which the judgment was entered, was not given in a contrivance between the plaintiff and defendant, to defraud the creditors; it is not necessary that the creditors should be made parties to the suit. *Whiting v. Johnson.* xi. 328
15. In such a case, the declarations of the defendant, in the absence of the plaintiff, respecting the amount of the debts he owed the plaintiff, cannot be given in evidence by the creditors. *Ibid.*
16. Nor is a declaration by the defendant, "that if a man cannot make both ends meet, he ought to secure something for his family," admissible in evidence. *Ibid.*
17. If a bond be taken for more than the real debt, with an intent to defraud the creditors of the obligor, the whole bond is void to the creditors. *Ibid.*
18. A voluntary settlement is void, as to debts existing at the time it is made, if the recovery of such debts be delayed, hindered, and defeated thereby; and if it be set aside, not only existing debts, but all subsequent debts will be let in upon the property settled. *Thomson v. Dougherty.* xii. 448
19. If the party, making a voluntary settlement, be indebted at the time, and do not provide for such debts by the settlement, nor secure them by mortgage, though he should mean afterwards to discharge them, but the settlement is made in contemplation of future debts, it is covinous and void. *Ibid.*
20. If a party, not indebted, make a voluntary settlement, in contemplation of future debts, and these debts are connected with the deed, with a view to keep the estate in his family, so as to exclude such future debts, the deed, as to them, will be inoperative. *Ibid.*
21. The conveyance of the whole, or the greater portion of a man's real estate, for the benefit of his wife and children, when he is about to embark in a new and hazardous business, is strong evidence of a fraudulent intention. *Ibid.*
22. But although a fraudulent settlement is void, as to creditors, it is valid as to the grantor, and those claiming under him; and, therefore, the estate settled will not pass by a general assignment for the benefit of the grantor's creditors; and consequently, a purchaser at the sheriff's sale, under a judgment against the grantor, obtained after the assignment, is entitled to recover, notwithstanding such assignment. *Ibid.*
23. In a suit for the price of property sold by the plaintiff to the defendant, the defendant produced the plaintiff's receipt for the purchase money, stating, that it was fraudulently given, to deceive creditors, a less sum being actually paid, and that it was void: *Held*, that being a party to the fraud, he could not produce evidence to annul the receipt, by showing this fraud. *Sickman v. Lapsley.* xiii. 224

FRAUDS AND PERJURIES.

See AGREEMENT, 9. PAROL AGREEMENT, 1.

Possession alone will not take a case out of the statute against frauds, &c. But it is a strong circumstance connected with others. *Bassler v. Neisley.* ii. 352

FRAUDULENT CONVEYANCE.

See MORTGAGE.

1. Where goods assigned are susceptible of delivery, a mere symbolical delivery is not sufficient to exempt the case from the charge of legal fraud if the assignor retain possession. It seems no colourable delivery will answer where actual delivery may be given. A schedule will not make an assignment valid, if otherwise it is fraudulent in law by the retention of possession. *Cunningham v. Nevile.* x. 401
2. Where the vendee wilfully alters a bill of sale, for the purpose of co-

vering property from execution, such altered instrument is not evidence to go to the jury.

If the owner continues in possession after an absolute assignment of goods, it is fraud *per se*, unless the possession is according to some condition or trust expressed in the assignment.

Evidence of the declarations of the servant of a debtor who had made an assignment of property, that he was hired by the debtor and was still in his employ about the property, made after the assignment, though not in the presence of the assignee is good to show the assignment colourable.

Babb v. Clemson. x. 419

3. What circumstances render the assignment of an insolvent debtor a fraud in law for want of delivery of possession. *Cameron v. Montgomery.* xiii. 128

FREEDOM.

See SLAVE.

FREEHOLDER.

Where a *capias ad respondendum* had been issued against a freeholder, whose freehold at the time he purchased it, was charged with a mortgage, which was subsequently satisfied, the court abated the writ, although the value of the freehold was less than the amount of the plaintiff's demand. *Fuler v. La Breure.* i. 363

FREIGHT.

See INSURANCE.

1. Where the consent of the merchant to accept his goods at an intermediate port may be fairly inferred from his actions, freight *pro rata* is due. *Gray v. Waln.* ii. 229
2. *Query.* Whether a contract for carrying goods on freight to a foreign port is dissolved by the blockade of the port in which the ship is loaded. *Staughton v. Raphael.* iii. 559
3. But in such case the master of the vessel has no right to detain the goods from the shipper till indemnification given, or compensation made. If entitled to these he must resort to his action on the case.

Ibid.

FUGITIVE.

See SLAVE.

1. A fugitive from a foreign country, cannot be arrested in *Philadelphia*, by a magistrate on a charge by a private person, of having committed murder in such foreign country, in order to afford an opportunity to the

executive of the United States, to deliver him up to the government of that country.

Query. Whether the executive of the United States, or *Pennsylvania*, has a right to apply to a magistrate to arrest a fugitive criminal for such purpose. *Commonwealth at the instance of Short v. Deacon.* x. 125

FUNERAL EXPENSES.

Of the proper allowance for funeral expenses. *Case of M'Glinsey's appeal.* xiv. 64

GAMING.

See RECOGNIZANCE, 11.

GARNISHEE.

See FOREIGN ATTACHMENT.

GENERAL AVERAGE.

See INSURANCE.

GENERAL ISSUE.

See EVIDENCE, 133, 134.

GERMAN LUTHERAN CONGREGATION.

1. Under the charter of the German Lutheran Congregation, in and near the city of *Philadelphia*, aliens, otherwise qualified are entitled to vote. *The Commonwealth v. Woelfer.* iii. 29

GOVERNMENT.

See OFFICERS, 1, 2, 3, 4, 5, 6.

GOVERNOR.

See EVIDENCE, 48. OFFICERS, 1, 2, 3, 4, 5, 6.

GRANDCHILD.

See DEVISE, 12.

GREENSBURG.

See TAXES, 3, 4.

GROUND RENT.

See ENTRY, 2.

GUARANTEE.

See ASSUMPSIT, 8, 30. LIMITATIONS, ACT OF. PARTNERS, 10. PROMISSORY NOTES AND BILLS OF EXCHANGE, 24. WITNES, 68.

1. B. being indebted to C., and J. to B., and J. having a judgment against L., an arrangement was made between C., B., and J., in pursuance of which J. assigned his judgment against L. to C., and B. delivered up to J., one of his bonds to him, and indorsed a receipt on another

of his bonds for a sum amounting to the difference between the bond delivered up, and the judgment against L. assigned by J. to C., J. having refused to assign the judgment, unless this was done. There was no written guarantee of the assigned judgment, not any express promise by J., either to B. or to C., that, in case the money could not be recovered from L., he would be responsible. L. proved insolvent, in consequence of which C. brought suit against J. *Held* that the law raised no duty from J. to C., by which the suit could be supported. *Jackson v. Crawford.* xiv. 290

GUARDIAN.

See INFANT. PRINCIPAL AND SURETY, 6. REGISTER OF WILLS, 1.

1. If it be made out a reasonable probability, that a debt has been lost by the neglect of a guardian, he is responsible; but not otherwise. *Pym v. Downing et al.* xi. 66
2. If a guardian consent to the misapplication of the money of their ward, by his co-guardian, particularly if he have it in his power to secure it, he is answerable. *Ibid.*
3. Execution for costs cannot be issued against a guardian on a judgment for a defendant, in a suit in the minor's name, brought by such guardian. *Pigger v. Westby.* xiii. 347

GUARDIAN AND WARD.

See LEGACY, 20. ORPHANS' COURT, 10, 11. WILL, 14.

1. A ward, soon after arriving at age, being in bad health and anxious to remove to a milder climate, had a settlement with his guardian, received the balance in his hands, and gave him a receipt in full; without which the guardian refused to deliver up the papers belonging to the estate. *Held*, that the receipt in full was not conclusive, and did not stand in the way of a new settlement under the authority of the Orphans' Court, though there was no fraud or circumvention. *Say's Executors v. Barnes.* iv. 112
2. Where a guardian uses the money of his ward, or neglects to invest it at proper times, he is chargeable with interest; and a reasonable rule is, to strike a balance of the money in his hands at the end of every six months, and charge him with simple interest on it, allowing a reasonable sum to

remain in his hands, to meet contingent expenses. *Ibid.*

3. A guardian is not entitled to commissions on sums charged against him for interest beyond what was charged in the settlement made with the ward. *Ibid.*
4. Commissions are not to be deducted at the foot of the account, but from time to time as the services for which they are chargeable are rendered. *Ibid.*
5. One being about to marry a widow, who had an estate of her own, consisting of shop-goods and outstanding debts, and household furniture and effects, which had belonged to her former husband, entered into articles by which it was agreed that she should enjoy all the property she then possessed, or might afterwards acquire, as her separate estate, with power to dispose of it as she pleased in her lifetime, or by last will; and in case of her making no disposition of it by will or otherwise, it was to be equally divided among all her children by her first husband. There was no inventory of the goods or outstanding debts, but it was agreed that the amount or value of the goods, chattles, wares, merchandizes, and debts then due or to become due to the said widow was 4000 dollars. The marriage took place and the husband was appointed guardian of the infant children of his wife by her first husband, and was in possession of the whole of his wife's property, subject to her right to dispose of it. *Held*, that on the settlement of his accounts with his wards, the guardian was not chargeable, with the whole amount at which her separate estate was valued, but only with the balance remaining in his hands after deducting the amount of payments made by order of his wife, from the gross amount of receipts. *Baker's Appeal.* viii. 12
6. In stating his account with his wife's separate estate, he charged himself with "sundries had for my children, 330 dollars, 66 cents." He afterwards paid his wife a sum of money, with which he credited himself thus: "by cash paid Mrs. R. for sundries had on account of my children, 310 dollars." The credit was allowed. *Ibid.*
7. It is the duty of a guardian, to keep a separate account with each of his wards, and it is no justification for

- him, that he suffered household goods, &c. which ought to have been distributed equally among all the children, to go into the possession of some of the family. But the court refused the appellant's interest on the value of furniture, books, plate, &c. from the time of their mother's death, when they were entitled to receive them. *Ibid.*
8. Where money is in the hands of a guardian, which has been used by himself, or which might have been put out to interest, but for his negligence, he is chargeable with interest. But he is allowed to keep a reasonable sum on hand for contingencies, and also a reasonable time to put out the surplus. *Ibid.*
9. If the guardian of the minor child of an intestate, accept for his ward, a purport of the real estate of the intestate, and enter into recognizances for the payment of the appraised value of the shares of the other children, in the manner prescribed by the intestate laws, the ward is bound by the act of the guardian, and cannot, on arriving at full age affirm it. *Case of Gelbach's Appeal.* vii. 205
10. If it be made out, to a reasonable probability, that a debt has been lost by the neglect of a guardian, he is responsible; but not otherwise. *Pym v. Downing et al.* xii. 66
11. If a guardian consent to the misapplication of the money of their ward, by his co-guardian, particularly if he have it in his power to secure it, he is answerable. *Ibid.*
12. Of the responsibility of a guardian for deficiencies occasioned by negligence. *Case of Isaac Johnson's Appeal.* xii. 317
3. The mere misemployment of money is no cause for a motion, but charging the corporation with money which the members never paid, is sufficient cause. *Ibid.*
4. The 13th article of the bye-laws of the guardians of the poor of the city of *Philadelphia, &c.* declares that no member shall be expelled by a less number than two-thirds of the members present, and that no expulsion shall take place without giving the accused person notice in writing to attend the board and answer the charges preferred against him, a copy of which shall be transmitted to him, which notice must be at least six days before the time appointed for such hearing. A number of charges, some of which authorized expulsion, were preferred against a member of the board, who was with a copy of the charges and fully heard in his defence, at a special meeting called at his own request, when a resolution, declaring that he had violated his duty as a guardian of the poor, was adopted by a less number than two-thirds of the members present. This amounted to an acquittal, and the board having afterwards at a stated meeting passed a vote of expulsion by a constitutional majority without any new accusation or further hearing, it was held to be illegal, and the expelled member was restored. *Ibid.*

HABEAS CORPUS.

See NEW TRIAL, 1. PRIVILEGE, 1.

1. Where an apprentice enlisted voluntarily in the army of the United States, under the act of congress, of the 10th of December, 1814, and was satisfied with his situation, the court, refused on a *habeas corpus* issued under the act of assembly of 1785, on the affidavit of the master, to determine the question of property, and restore him to the master. The master in such case, must resort to an action against the person who harbours his apprentice. *Commonwealth v. Robinson.* i. 353
2. The court will not discharge prisoners on a *habeas corpus*, while an indictment is pending against them, on which they have been committed by a court having competent jurisdiction, on the ground that they have been already tried on that indictment and acquitted on some of the counts, but no verdict given on the others. The remedy, if an erroneous

GUARDIANS OF THE POOR.

See DOMESTIC ATTACHMENT. PAUPER. RECOGNIZANCE, 11. SOLDIER.

1. The authority given by the 6th section of the act 31st of March, 1812, to two aldermen, to determine the amount of property to be taken under a warrant of seizure, cannot be delegated to the guardians of the poor. *Guardians v. Picard.* i. 239
2. The guardians of the poor of the city of Philadelphia, Southwark and the Northern Liberties, have power to expel members from their board. *Commonwealth v. Guardians.* vi. 469

judgment should be rendered, is by writ of error. *Commonwealth v. Deacon*. viii. 72

HARD LABOUR.

See INDICTMENT, 24.

HAWKER AND PEDLAR.

A hawker and pedlar, who goes from house to house, in an incorporated or county town, offering for sale, goods prohibited by the act of the 28th of March, 1799, and sells any one article, even of trifling value, incurs the penalty of fifty dollars, imposed by that act. And a license obtained under the act of the 4th of March, 1824, does not protect him. *Commonwealth v. Willis*. xiv. 398

HEIRS.

See PLEADING, 3.

In a suit against an executor, the heirs of the testator, to whom land has descended, may be permitted to appear, and take defence in the name of the executor; and that though the suit is pending before arbitrators.

They may also appeal in right of, and in the name of the executors from an award of arbitrators. *Prütz v. Evans*. xiii. 9

HIGHWAY.

See ROADS.

The obstruction of a highway is indictable at common law, and not under the act of assembly of the 6th of April, 1802; which inflicts an additional punishment for a distinct offence, viz: for not removing the nuisance, on notice from the supervisors of the township. In a prosecution, therefore, for running a fence across a public road, it is not necessary to prove, that notice to remove it, and repair the damage, was given by the supervisors to the defendant. *Kelly v. Commonwealth*. xi. 345

HOMINE REPLEGIANDO.

See EVIDENCE, 178. SLAVE.

HOTCHPOT.

An advancement in lands by a father to his son, is to be estimated according to its value at the time of the advancement, and not at the time of the father's death. *BRACKENRIDGE, J., dissented. Oyster v. Oyster*.

i. 422

HUSBAND AND WIFE.

See CHILDREN. DOWER, 3, 4, 5. EVIDENCE, 122. FRAUD, 2. INT-ESTATE, 6. JUSTICE, 28, 29, 44. ORPHANS' COURT, 9, 21, 22, 23, 24. LOUISIANA, 1, 2, 3, 4, 5, 6.

1. A recognizance taken in the Orphans' Court, for the wife's share of land, in the name of the husband and wife, not reduced into possession nor disposed of by the husband, survives, on his death to the wife. *Lodge v. Hamilton*. ii. 491

2. A divorce of the husband, from the bonds of matrimony, on account of the wife's adultery, makes no difference in the principle. ii. 491

3. A separate acknowledgment of a *feme covert*, is not invalidated by the circumstance of a third person being present, with her and the magistrate, after the husband had withdrawn. *Jones v. Maffet*.

v. 523

4. In a suit for necessities, found for the defendant's wife, after evidence given of the marriage, of their living apart, without suspicion that they were man and wife, and of a libel, by the wife, for a divorce, evidence is admissible, on behalf of the plaintiff, to show that the wife had solicited the husband to receive her again as his wife, and had offered to return and live with him as such, and he refused to receive her. *Cunningham v. Irvin*. vii. 247

5. And this evidence is admissible, whether the offer were made before or after the libel for a divorce; for if after, it will be presumed that the offer embraced an intention to discontinue the libel. *Ibid*.

6. In such suit, the plaintiff may give evidence to prove the health, general conduct, and means of living of the wife, during the separation, and prior to the time when the plaintiff furnished her with necessities. *Ibid*.

7. The husband is not exempted from liability for necessities, furnished his wife during her separation from him, though it was by her agreement; if she offer to return, and he refuses to receive her, and has furnished no means for her subsistence. *Ibid*.

8. Such necessities must, in such case, be agreeable to the rank and condition of the husband; and the husband is liable, not merely for the difference between the sum earned by her labour, and the amount of her

necessary expenses, he must support her himself, or pay those who do support her, in a reasonable manner. *Ibid.*

9. If a husband, on separation, agree to pay a trustee for his wife, an annuity, during her life, and execute a bond, at the same time, for paying the annuity as alimony, for and during the term of her natural life, a divorce *a vinculo*, and subsequent marriage of the wife, do not exempt the husband from a suit on the bond for the annuity. *Blaker v. Cooper.*

vii. 500

10. The deed of a *feme covert* is void, if it do not appear from the certificate of her acknowledgment, that she was examined separately and apart from her husband: stating that she voluntarily confessed thereto, will not cure the defect. Nor is the parol evidence of the magistrate admissible, to show a separate examination. *Jourdan v. Jourdan.*

ix. 268

11. When the deed, executed by a married woman, is void, parol evidence is admissible, to show, that after her husband's death, she delivered and ratified it. *Ibid.*

12. Circumstances may be proved, from which the jury may infer such delivery. *Ibid.*

13. Bequest of money, by will, to the children of the testator's daughter; the testator afterwards provides, by codicil, that the money shall be paid to his daughter when she is either divorced from her husband, or voluntarily withdraws from him. In the event of the separation of the daughter from her husband, by his desertion of her, this is a bequest to her separate use.

14. The suit for such legacy, should be brought in the name of the husband and wife; but if brought by the wife, without the husband, advantage must be taken of it by plea in abatement; the objection is not available, in arrest of judgment, or in error. *Perry v. Boileau.* x. 208

15. A *feme covert* joined her husband in a deed of her real estate, but never separately acknowledged it, conveying the estate to trustees, for the payment of the husband's debts, and then in trust for her separate use. Afterwards, living in a state of separation, the wife, by an instrument, purporting to be her last will, disposed of the property, and died;

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held, that the disposition was void.

West v. West.

x. 445

16. Where, in consequence of proceedings in the Orphans' Court, for the valuation and partition of the real estate of the intestate, a part of it is allotted and decreed to A., the husband of the daughter of the intestate, in right of his wife, upon his giving a mortgage for a certain sum to the other children of the intestate, but no such mortgage is ever given; in an ejectment, by another daughter of the intestate, for her share of the land, thus allotted to A., the defendant may, in order to show that the whole sum, for which A. was decreed to give a mortgage, has been paid, give in evidence, payments on account of the maintenance and education of the plaintiff, while a minor, by A., he being one of the guardians, and payments to her husband after her marriage.

Smith v. Scudder.

xi. 325

17. But declarations, by the husband of the plaintiff, with respect to the expenses of his wife's education, before marriage, are not evidence.

Ibid.

18. It is not error, in such a case, to leave it to the jury to decide, in relation to transactions between the husband of the plaintiff, and A., whether any, and what payments have been made, telling them at the same time, that any other dealings between the parties, than direct payments, ought not to be applied to the discharge of the plaintiff's claim, unless so understood and intended.

Ibid.

Money received by the husband of the plaintiff, as the executor of A., when he has settled no administration account, and there is no evidence of any act of the executor, indicating an intention to separate any part of the money received by him as executor, and apply it to the satisfaction of his wife's claim, is no payment of the debt due in right of the wife; and the court ought not to leave it to the jury, to infer satisfaction of the plaintiff's demand. The jury should be instructed, that as the evidence was of a bare receipt of money as executor, such receipt did not, in law, amount to payment of the money due to the plaintiff.

Ibid.

19. If a deed, purporting to be by husband and wife of the husband's lands, be proved, by proof of the hand-

3 A

writing of a deceased subscribing witness, it vests the title in the grantee, notwithstanding the signature of the wife is forged. *Scott v. Gallagher et al.* xi. 347

20. In ejectment, the plaintiff claimed under A. and B. his wife. It was proved she had been married to D. who was dead more than thirty years, and one of the plaintiff's witnesses stated she had had three husbands, before marrying A. The court may leave it to the jury, to presume all the prior husbands to be dead. *Breiden v. Paff.* xii. 430
21. Where the wife permits her husband to receive the rents of an estate, conveyed in trust for her separate use, by the husband, after marriage; where they live together, and the rents are generally laid out by the husband, together with his own money, in the purchase of goods for a store kept in the name of the wife in their dwelling house, and on his dying intestate, the wife, as his administratrix, accounts for the goods in the store as his, she is not entitled, on the settlement of her administration account, to retain against the estate of her husband the amount of the rents received by him. *Case of McGlinsey's Appeal.* xiv. 64
22. The act of assembly curing defects in the acknowledgments of females covert is constitutional: but it does not apply where judgment was rendered previous to its passage. *Fulweiler v. Baugher.* xv. 45
23. Married women may, jointly with their husbands, give a power of attorney to convey land in *Pennsylvania*, and if duly acknowledged, the conveyance under it would be valid. *Barnet v. Barnet.* xv. 72
24. A wife cannot be a citizen of a state different from that in which her husband's domicile is, so as to sue in the courts of the *United States*. *Dougherty v. Dougherty.* xv. 84

ILLEGAL DEMAND.

1. The test, whether a demand connected with an illegal transaction can be enforced at law, is, whether the plaintiff requires the aid of the illegal transaction to establish the case. *Swan v. Scott.* xi. 155
2. A. obtained an award of arbitrators against B. founded on an illegal lottery transaction, from which B. appealed. He afterwards withdrew the appeal, and on the same day gave A. his bond, in satisfaction of

the award, and A. entered satisfaction on the record. In a suit brought upon this bond, against B., it was held, that he could not go beyond the award, and show that the demand for which it was obtained originated in an illegal transaction. A receipt given anterior to the award, and which had not been allowed by the arbitrators, cannot be given in evidence in an action on the bond, to show part payment. *Ibid.*

ILLEGAL VOYAGE.

See ACCOUNT RENDER, 1.

IMPROVEMENT.

See APPLICATION, 3. DESCENT.

EVIDENCE, 173. FRAUD, 4. LIMITATION, 14, 16, 27. ROADS, 18. WARRANT. WARRANT AND SURVEY.

1. An improvement on lands purchased by the proprietary from the *Indians* gives no title, though such improvement be continued after the time of the purchase. *White v. Kyle's Lessee.* i. 515
2. Taking out a warrant without calling for an improvement, though it is strong evidence of the relinquishment of the improvement, is not conclusive evidence. i. 515
3. A person to whom a promise of his improvement was made by Mr. Secretary *Peters*, in 1743, was bound to enter an application in a reasonable time after opening the land office in 1775. What is a reasonable time has been judged of as matter of law. But lying by eleven years, and then making a sale, is not such a case, as would entitle a person having such a promise or those claiming under him. i. 515
4. A parcel sale of an improvement right accompanied with delivery of possession and payment of purchase money, may be proved by the declarations of the vendor, where such vendor has left the state seventeen or eighteen years, and there is no evidence of his having been heard of since. *Gilday v. Watson.* ii. 407
5. A person who settled in 1762, was driven off by the *Indians* in 1763, and who might have returned in 1765, but did not return till 1771, cannot claim under his improvement against an intervening title. *Burns v. Swift.* ii. 436
6. The general rule is, that the labour of a minor son will enure to the use of the father, but if a father permit

his son to improve and settle on a tract of land for his own use and benefit, his title is the same as if he had been of age when he commenced his improvement. *Galbraith v. Black.* iv. 207

7. Where a warrant refers to an improvement, and mentions a particular day from which interest is to be paid on the purchase money, it is not necessary for the warrantee to prove an improvement on that day; he may give evidence of an improvement at any time subsequent to it, but prior to the issuing of the warrant. *Humes v. M'Farlane.*

iv. 427

8. A warrantee cannot give evidence of an improvement made at any time prior to the day mentioned in his warrant for the commencement of interest, even where the board of property have decided on a caveat entered against the acceptance of the survey made on his warrant, that his title originated in a settlement made by another person, at an earlier period, and have directed a patent to issue to him in virtue of that settlement. *Ibid.*

9. After an award in favour of the defendant, in a former ejectment any delay in bringing a new ejectment short of the period allowed by the statute of limitations, will not of itself authorize the jury in such second ejectment to annex a condition to their verdict for the plaintiff, that he shall pay the defendant a certain sum for his improvement made since the award. *Collins v. Rush.* vii. 147

10. If such verdict be given, the court, on error brought by the defendant below, will reverse the judgment entered upon it. *Ibid.*

11. One who enters on land as a trespasser, clears it, builds a house, and lives on it, acquires something which he may transfer by deed or descent. *Overfield v. Christie.* vii. 173

12. A man cannot be seised of an improvement right in trust for another. Therefore where it was doubtful upon the evidence, whether an improvement made by a tenant, was made for the plaintiff or his father, it was held to be error to instruct the jury, that even admitting the plaintiff to have been a trustee for his father, the action might be sustained in his name. *Smith v. Oliver.*

xi. 257

IMPROVEMENT RIGHT.

See SETTLEMENT.

1. Transfers of improvement right, accompanied by a possession exceeding thirty years, prove themselves. *Healy v. Moul.* v. 181
2. But a party cannot give such transfer in evidence if made prior to the day when interest commenced on his office right, nor if there be no shadow of title in the party making the transfer. *Ibid.*

INCUMBRANCES.

See LIEN. VENDER AND VENDEE.

7, 15, 22. WARRANTY, 2.

1. It is sufficient in *Pennsylvania*, to entitle a vendor to relief against the payment of purchase money, on the ground of existing incumbrances, that eviction may take place; it is not necessary that an eviction at law should actually have taken place. *Share v. Anderson.* vii. 43
2. It seems that if most part of such incumbrances are discharged, the jury may allow for the residue in the verdict. *Ibid.*
3. Incumbrances, though not paid off by the defendant, are a good defence to the amount in an action on the bond for the purchase money. *Poke v. Kelly.* xiii. 165

INDEBITATUS ASSUMPSIT.

See SURETY, 2.

INDEMNITY.

The defendant engaged to keep [the plaintiff clear of back interest, but not doing so, judgment was obtained for it against the plaintiff. *Held*, that from that moment the plaintiff was damnified, and might sue on the engagement. *Gardner v. Grove.*

x. 136

INDENTURE.

See APPRENTICE, 10. NEGRO AND MULATTO, 7.

INDICTMENT.

See COSTS, 10, 12. FORCIBLE ENTRY. FORGERY. HIGHWAY. PLEADING. TRIAL.

1. An indictment for forcible entry and detainer charging the entry to have been into a messuage and ten acres of arable land, the eviction to have been from the land only, and the detainer to have been from both messuage and land, is good, and the defendant may be acquitted of the entry, and convicted of the detainer. *Commonwealth v. Rogers et al.*

i. 124

2. An indictment charging the defendant with "keeping a disorderly and ill-governed house, and procuring men and women of evil fame &c. to frequent it, permitting them to remain there, drinking, tippling, and misbehaving themselves, to the common nuisance of all the liege citizens of the commonwealth," &c. *Held*, to be good. *Commonwealth v. Stewart*. i. 342
3. Upon an indictment for concealing the death of a bastard child, if the offence be charged thus, "the said infant having on the day and year, &c. died, (the mother) did endeavour privately to conceal the death of the said infant," this is a sufficient averment of the death of the child. *Boyles v. Commonwealth*. ii. 40
4. In such an indictment it is not necessary to set forth in what manner or by what arts, the mother endeavoured to conceal the death of the infant. ii. 40
5. Upon an indictment for concealing the death of a bastard child, the jury found the prisoner guilty of the concealment "in manner and form as she stands indicted." The verdict was held to be bad, in consequence of the omission to find the bastardy of the child. ii. 40
6. Any offence which in its nature and by its example tends to the corruption of morals, as the exhibition of an obscene picture, is indictable at common law. *Commonwealth v. Sharpless*. ii. 91
7. In an indictment for exhibiting an obscene picture it need not be averred, that the exhibition was public; if it be stated that the picture was shown to sundry persons for money, it is a sufficient averment of its publication. ii. 91
8. Nor is it necessary that the postures and attitudes of the figures should be minutely described. It is enough if the picture be so described as to enable the jury to apply the evidence, and to judge whether or not it is an indecent picture. i. 91
9. Nor is it necessary to lay the house in which the picture is exhibited to be a nuisance; the offence not being a nuisance, but one tending to the corruption of morals. i. 91
10. Keeping a disorderly house is not an indictable offence, unless it be laid as a common nuisance. Therefore a verdict of "guilty of keeping a disorderly house and disturbing his neighbours," is bad. *Hunter v. Commonwealth*. ii. 298
11. In an indictment for burglary the word *mansion house* is good description of the premises. *The Commonwealth v. Pennock*. iii. 199
12. An indictment charging a conspiracy to defraud by means of false pretences and false writings, in the form and similitude of bank notes, and stating the overt act to consist in uttering a note, purporting to be a promissory note, &c. and to have been signed, &c. is sufficient. *Collins v. The Commonwealth*. iii. 220
13. An overt act charged to be done by one conspirator, in pursuance of the conspiracy, is to be considered the act of all. *Ibid*.
14. It is not necessary in such indictment to charge the actual defrauding of any person; passing with intent to defraud is sufficient. *Ibid*.
15. What constitutes a good form of indictment for selling spirituous liquors without license. *The Commonwealth v. Baird*. iv. 141
16. An indictment stating, that the defendant feloniously stole, took and carried away, "sundry promissory notes for the payment of money, of the value of eighty dollars, of the goods and chattels of A. B.," is too vague and uncertain. The notes should be more particularly described, and it should be set forth, that the money was unpaid on them. *Steward v. The Commonwealth*. iv. 194
17. In an indictment for adultery, it is not necessary to state the township in which the defendant resided, when the offence was committed. *Duncan v. The Commonwealth*. iv. 449
18. Two indictments for conspiracy, found at different sessions, may be tried by the same jury, notwithstanding the objection of the defendant, if the court in its discretion, think proper to allow it; especially if the right of the defendant to challenge four jurors on each indictment is allowed. *Wihers v. The Commonwealth*. v. 59
19. An abuse of such discretion, even if such abuse existed, would not be error. *Ibid*.
20. An indictment is good in which the day of the commission of the offence is laid by reference to the caption. *Jacobs v. The Commonwealth*. v. 315

21. An entry of arraignment on the record is necessary only in cases that were at any time capital under our acts of assembly. *Ibid.*
22. An indictment for an assault with intent to steal from the pocket, not stating the goods or money intended to be stolen, is good. *Commonwealth v. Rogers*. v. 463
23. The proper conclusion of an indictment is "against the peace and dignity of the Commonwealth of Pennsylvania." *Ibid.*
24. The punishment of hard labour cannot be inflicted for an assault with intent to pick a pocket. *Ibid.*
25. An indictment, under a particular statute, must be conformable to that statute. *Updegraff v. Commonwealth*. vi. 5
26. An indictment, founded upon the act of the 8th of April, 1799, charging the defendant with the erection of *divers* fish-dams, &c. is too general; each erection is a distinct offence, and the special manner of each should be set forth with reasonable certainty; but it seems that the form, dimensions, and materials, of which it is composed, need not be stated. *Ibid.*
27. An indictment for assault and battery, with intent to kill, is not vitiated, by stating that the defendant did *bite* or *cut* the ear, &c.; the assault and battery, with intent to kill, being the offence which is punishable, and the injury inflicted merely a circumstance of aggravation. *Scott v. Commonwealth*. vi. 224
28. An indictment, charging that A. "with force and arms, &c., unlawfully and wickedly, did attempt to pick the pocket of one B., with intent, then and there, feloniously to steal, take, and carry away the goods and chattels, monies and property of the said B.," is too vague and uncertain to be supported. *Randolph v. The Commonwealth*. vi. 398
29. A count in an indictment, charging that the defendant sold a lottery ticket and tickets, in a lottery not authorized by the laws of this commonwealth, is bad for its generality. It should specify the name of the lottery, and the number of tickets sold. *Commonwealth v. Gillespie*. vii. 469
30. A count, charging a conspiracy to sell a lottery ticket and tickets, in a lottery not authorized by the laws of the commonwealth, is good. *Ibid.*
31. It is no objection on demurrer, or in arrest of judgment, that several distinct offences of the same nature are joined in the same indictment, whether in misdemeanor or felony; but the court might, in their discretion, compel the prosecutor, in felony, to elect on what charge he would proceed. *Ibid.*
32. Several persons may be charged in the same indictment, for the same act, when the act admits of the agency of several. *Ibid.*
33. So, also, several persons may be charged in the same indictment, in different counts, for different offences, though the court, in its discretion, might quash such indictments. *Ibid.*
34. If the indictment charge that the defendant sold a lottery ticket, in the words and figures following, it must contain a literal recital of the ticket; and a variance in spelling a name, though the sound is the same, as *Burrill*, for *Burrall*, is fatal. *Ibid.*
35. Where a statute inflicts a punishment on that which was an offence before, judgment may be for that punishment, though the indictment do not conclude *contra formam statuti*. *Russell v. The Commonwealth*. vii. 489
36. Where a person has been sentenced to hard labour on a former indictment, and the term of imprisonment is not yet expired, sentence of imprisonment, at hard labour, may be passed on another indictment, to commence from the day on which the former sentence is to expire. *Ibid.*
37. If one be charged as accessory to a felony committed by several, some of whom only are convicted, and the others not proceeded against to conviction or outlawry, he may be arraigned and tried as accessory to such as have been convicted; but if he be tried, convicted and sentenced as accessory to all, without his consent, it is error. *Ibid.*
38. Such consent will not be implied from the party's pleading and going to trial. *Ibid.*
- If the indictment state a burglarious entry, with intent to steal, and then and there stealing, it is but one offence, *viz.*: burglary, and a count charging a party as accessory "to the felony aforesaid," is good. *Ibid.*
39. In an indictment for a conspiracy to cheat, no overt act need be set

- forth. *The Commonwealth v. M^cKisson, and another.* viii. 420
40. An indictment for a libel, is bad, if it charges that the defendant published a certain libel, the substance of which is as follows: (the very words of the libel must be set out.) *Commonwealth v. Sweeney.* x. 173
41. An indictment against a justice of the peace, for refusing a copy of his proceedings, ought to state a previous tender of his fee for that service, and the want of it is fatal. *Wilson v. The Commonwealth.* x. 373
42. An indictment against a county commissioner, under the act of the 21st of March, 1816, for being interested in the management and superintendence of a public building, under the authority of the commissioners, he being then a commissioner, must be prosecuted in the Quarter Sessions: the Mayor's Court has not jurisdiction. *Commonwealth v. Thum.* x. 316
43. An assault and battery, with intent to commit a rape, being a misdemeanor only, the omission of the word, *feloniously*, does not vitiate the indictment for such an offence. *Stout v. The Commonwealth.* xi. 177
44. In an indictment for a misdemeanor, the day and place named in the beginning, refer to all the ensuing acts, and need not be repeated. *Ibid.*
45. In an indictment for a rape, it is not necessary to charge that the offence was committed *forcibly, and against the will of the woman.* It is sufficient if it charge that the defendant *feloniously did ravish, and carnally did know her.* *Harman v. The Commonwealth.* xii. 69
46. A count for a rape, may be joined in the same indictment with one for an assault and battery, with intent to ravish; but if the defendant be found guilty generally, he can be sentenced only on the count for a rape. *Ibid.*
47. If an act of assembly direct the president, managers, and company of a turnpike road, to remove a gate, the persons who are president and managers, are not individually liable to indictment, if the direction is not performed. *The Commonwealth v. Demuth et al.* xii. 389
48. The jury cannot convict one of two defendants, jointly indicted for a misdemeanor, and acquit the other, and direct the latter to pay the costs. *Searight v. The Commonwealth.* xiii. 301
49. Constables are indictable for a nuisance, who conduct a sale under an execution, in a public street of the city, thereby obstructing the passage. *Commonwealth v. Milliman.* xiii. 403
50. If two persons are indicted for such nuisance, if they acted separately, and each conducted his own sale, and one obstructed the passage, and the other did not, the jury may convict one, and acquit the other. *Ibid.*
51. Indictment, at common law, for extortion, does not lie against a magistrate for taking illegal fees. The only remedy is to recover the penalty of fifty dollars, under the act of the 28th of March, 1814, section 26. *Commonwealth v. Evans.* xiii. 426
52. Unless it appear on the face of an indictment for burglary, *what judgment* was given on a former indictment for the same offence, it is error to sentence the defendant to imprisonment, at hard labour, during life. It is not enough, if the indictment state that the defendant was *convicted* on the former indictment, and that the court gave *judgment.* *Smith v. The Commonwealth.* xiv. 69

INDORSER.

See ASSUMPSIT, 8. PROMISSORY NOTE.

INDORSEMENT.

See OBLIGATION, 3.

INFANT.

See DOWER, 5.

1. The appearance of an infant, by attorney, in the court below, is error, and is assignable as such. *Moore v. M^cEwan.* v. 373
2. If it be assigned for error, that an infant appeared below, by attorney, the plea of *in nullo est erratum*, confesses the fact. *Ibid.*
3. If consentable lines are fairly made between adjoining tracts, by a guardian, on behalf of an infant, and an adult, the latter, or those claiming under him, cannot object on the ground of the infancy; and it seems that, if the infant do not dissent when he comes of age, but acquiesces, he is for ever bound. *Brown v. Caldwell.* x. 114
4. The enlistment of an infant is good, at common law. There is no act of congress prohibiting the enlistment of a minor in the *marine corps.* *The Commonwealth v. Gamble.* xi. 93

5. Whether an enlistment be valid or not, one under arrest, upon a charge of desertion, must abide the sentence of a court martial, before he can contest the validity of the enlistment. *Ibid.*

6. In an action on a contract, entered into by a minor, as security for another, the plaintiff cannot, where the plea is infancy, give, in evidence, that the defendant, while a minor, entered into a number of contracts, received conveyances of land in his own name, and for his own use, and transacted a variety of business, as an adult. *Curtin v. Patton et al.*

xi. 305

7. Nor is evidence admissible, to show that the minor was in partnership with the person for whom he became security. *Ibid.*

8. To make a contract, entered into by a minor, as security, binding upon him when of age, it must appear, that after his arrival at full age, he confirmed the contract by some distinct act, with full knowledge that it would be void without such confirmation. *Ibid.*

9. *Query*, Whether there may not be cases of such gross and palpable fraud, committed by an infant, as would render valid a release of his right to land. *Stoolfoos, et al. v. Jenkins, et ux.*

xii. 399

10. But evidence that an infant, female, executed such release, in collusion with her guardian, having first chosen him guardian, for the purpose of cheating the releasees, and then deceived them; by persuading them that their title would be confirmed by the release, and thus prevailed on them to pay her three hundred pounds, as her share of the land, does not constitute such a case. *Ibid.*

11. Nor, in a suit for land by such infant, which she claims by descent from her mother, and which she has thus released, is the will of her father evidence, showing lands devised to her by him: it is not a case where the party will be put to an election. *Ibid.*

INQUEST.

1. When an estate is manifestly and clearly undervalued, it is the duty of the court to set the inquest aside; but it should be a clear case. *Rex v. Rex.*

iii. 533

2. But when it appeared, that the jury acted under an error in suppos-

ing, where there were seven heirs, that if the estate were divided, it must be into seven parts, and on that ground returned, that it could not be divided, and it appeared that it might well be divided into fewer parts, the inquest was set aside. *Ibid.*

3. It ought to appear, with reasonable certainty, on the record, what the whole of the estate is, that is to be appraised. *Ibid.*

INQUIRY, WRIT OF.

See DAMAGES, 12.

INQUISITION.

1. If an inquisition has been held on one *fi. fa.*, and the land condemned, another judgment creditor may take out a *venditioni*, and sell without a new inquisition. *M'Cormick v. Meason.*

i. 92

2. Where the court below assigned an insufficient reason for setting aside an inquisition and extent, this court being of opinion, that the court below were convinced that the jury had valued the land too highly, refused to reverse the judgment. *Miller v. Milford.*

ii. 35

3. The day on which an inquisition was taken, is not a matter of record, but a matter in *pais*. *Thomas v. Wright.*

ix. 87

INSOLVENTS AND INSOLVENT DEBTORS.

See ASSIGNMENT, 6, 7, 8. ASSUMPSIT, 25. ESCAPE. EVIDENCE, 262. INTESTATE, 10. JUDGMENT, 38. LIMITATIONS, 29, 30. TROVER, 4, 5. WITNESS, 9, 10, 11, 33, 49.

1. The priority given to the *United States*, by the act of congress of the 7th of *March*, 1799, in the payment of debts, due upon custom house bonds, out of the estates of insolvents, supersedes a foreign attachment, laid upon the property of the insolvent prior to the insolvency, and such debts must be first paid out of the funds attached in the hands of the *garnishee*. *Willing v. Bleeker.*

ii. 221

2. If a man, clearly insolvent, having ceased to do business, with a view of assigning the whole of his estate for the benefit of his creditors, make first an assignment of part to one creditor, or set of creditors, and afterwards, an assignment of the residue to another creditor or set of creditors, the two assignments are to be considered as one transaction,

- as far as regards the right of preference of the *United States*, who may resort to either fund for the payment of custom house bonds. But if one fund has paid the whole debt to the *United States*, it is entitled to contribution from the other. *Downing v. Kintzing.* ii. 326
3. The insolvent law of 26th *March*, 1814, discharges the defendant's person, as to a note drawn before his discharge, but payable afterwards. *George v. Hoover.* iii. 559
 4. On a conviction of fraudulent insolvency, charging that the defendant concealed his estate and effects, in order to expect and derive future benefit to himself, the court cannot inflict the punishment of hard labour. *Gulldin v. The Commonwealth.* vi. 554
 5. An insolvent debtor, who has been discharged by the insolvent law of New York, and assigned, among other property, a horse, in the hands of a citizen of *Pennsylvania*, cannot afterwards maintain trover for such horse. *Teetor v. Robinson.* vii. 182
 6. An insolvent debtor who has assigned his property, cannot sue for a cause of action, existing at the time of the assignment, in his own name, though empowered by his creditors, and though the assignees have not acted. *Stoever v. Stoever.* ix. 434
 7. The debtor is not exempted from the payment of interest by the continued absence of the creditor at a distance from the state, and his not being heard of for many years. Therefore, where bonds were given, in *Northampton* county, for a portion of a distributive share, and the obligee was then absent, and the last that was heard of him afterwards, was, that he was at *Natchez*, in 1806, and administration was taken out of his estate, in 1818, on the presumption of his death; it was held, that the obligor was bound to pay interest on his bond. *Case of Martin Shaffer's estate.* ix. 263
 8. Where the defendant paid money to the plaintiff which both parties thought the plaintiff was entitled to, but it afterwards turned out that the plaintiff was not entitled to it; held that interest ought not to be paid by the plaintiff till the defendant explained the mistake and demanded payment. *King v. Diehl.* xi. 409
 9. By an assignment under the acts of 1729, 1730, and 1798, the debtor's estate in land passes to the trustees, though their assent does not appear. *Gray v. Hill.* x. 436
- An assignment by trustees appointed under an act has expired passes the estate, and the assignees may maintain ejectment. *Ibid.*
10. Where one is arrested in vacation and gives bond, agreeably to the act of the 28th of *March*, 1820, to appear at the next court, and surrender himself to prison on failing to comply with all things required to entitle him to discharge under the insolvent laws, the possession of personal property sufficient to satisfy the debt, and the omission to show it to the officer making the arrest, even if they make the arrest illegal, and the giving bond, fraudulent (which, it seems, they do not,) do not operate against a defence founded upon performance of the condition of the bond. *Lincoln et al. v. Williams.* xii. 105
 11. A discharge at the court at which the petitioner was bound to appear is a performance of the condition of the bond, whether the discharge be founded upon a petition filed in consequence of the arrest, or independently of it; and, consequently, it is unnecessary to recite the arrest in the petition, or to show, in any other way, that the petition was filed in continuation of the proceedings which took place in vacation. *Ibid.*
 12. The property of an insolvent debtor passes to his trustees immediately on his assignment, and all the world is bound to take notice of it. Consequently, a payment to the debtor, the day after his assignment, by one who has not actual notice of it, is not valid. *Wickersham v. Nicholson.* xiv. 118
 13. The record of the discharge of an insolvent debtor, is conclusive as to the fact of his having complied with all things required by law to entitle him to a discharge; and cannot be inquired into in a collateral action. *Sheets v. Hawk.* xiv. 173
 14. It is not a forfeiture of the bond given by an insolvent debtor to the arresting creditor, under the act of 28th of *March*, 1820, if the record merely show that the debtor appeared and presented his petition at the time appointed, that the court appointed the first day of the next term for a hearing, directing at the same time notice to be given to the creditors, and that on the fourth day of the next term, he was sworn

and discharged, without any record being made of his appearance or non appearance on the first day, or of any continuance of the case from day to day; particularly if the arresting creditor, or the person beneficially interested, had notice, that the debtor was not discharged on the first day of the term, and endeavoured to make an arrangement with him respecting the debt, which would render it unnecessary for him to take the benefit of the act. *Ibid.*

15. Although the assignment of an insolvent debtor passes the legal estate in his lands, yet a trust results by operation of law, which as soon as the debts are satisfied, entitles him to the possession against his assignees, *et a multo fortiori*, against a stranger, against whom he may maintain an ejectment in his own name; and, in the absence of proof to the contrary, this court will intend that he produced satisfactory evidence, that the debts were paid; particularly after a lapse of fourteen years. *Ross v. M'Junkin.* xii. 364

16. A bond given by an insolvent debtor, with sureties, in order to obtain his discharge from imprisonment, by virtue of the act of the 28th of *March*, 1820, with condition, that "if the insolvent debtor should be and appear at the next Court of Common Pleas, then and there to make application for the benefit of the several acts for the relief of insolvent debtors, and should abide all orders of the said court in and about the premises, then the said obligation should be void; otherwise it should remain in full force and virtue," varies substantially from the bond prescribed by the act, and is void. *M'Kee v. Stannard.* xiv. 380

INSOLVENT LAW.

1. A discharge under the insolvent law of this state, protects a person from imprisonment by virtue of a bail piece from a neighbouring state. *Commonwealth ex rel. Dugar v. Riddle.* i. 311
2. A discharge under the insolvent laws of this state is valid, though the petitioner do not mention in the list of creditors returned to the court, the name of the plaintiff at whose suit he is imprisoned; provided he has given the notice prescribed by the Court. *The Commonwealth v. Corman.* iv. 2
3. Where goods had been assigned by

an insolvent debtor under the act of 26th of *March*, 1808, but remained in his possession with the permission of the assignees for more than eight years, it was held, that they were not liable to an execution for a debt contracted *prior* to the assignment, and due to a creditor who had signed a letter of license exempting the debtor from suits, and his property from executions, during the term of seven years *after* his discharge. *Wager v. Miller.* iv. 117

4. It seems, that such length of possession would be fraudulent, with respect to a debt contracted *after* the discharge. *Ibid.*
5. If the court appoint more than one trustee under the second section of the act of the 26th of *March*, 1814, and only one give bond agreeably to the third section, he cannot exercise the duties of his trust, and consequently an action brought by him alone, cannot be maintained. *Park v. Graham.* iv. 549

INSTRUMENT.

The construction of any written instrument is the exclusive province of the court, but the description of the land conveyed, its limits and contents, are often mixed questions of law and fact. *Collins v. Rush.* vii. 147

INSURANCE.

See RESPONDENTIA.

1. Insurance "at and from *Philadelphia* to *Gottenburg* and another port," with warranty against illicit trade and seizure in part. The instructions of the captain were to touch at *Gottenburg* for information, and then proceed to *Eckenforde*, where, by the bills of lading, the cargo was to be delivered. On arrival at the quarantine ground at *Gottenburg*, information was received of the Danish decree against the importation of colonial produce in neutral bottoms. Permission was then asked to land the cargo at *Gottenburg*, which was refused on account of a similar decree of *Sweden*. The vessel, being in a leaky condition then went to *Leith* to refit. Here a quantity of cotton amounting to one-third of the whole cargo, was sold. The rest of the cargo, not being permitted to remain at *Leith*, returned to *Philadelphia* in the vessel; upon the arrival of which the assured abandoned. Held, that the plaintiff could not recover as for a

- total loss. *Krumbhaar v. Marine Insurance Company.* i. 281
2. Abandonment should be made as soon as it is known the voyage is broken up. i. 281
 3. A warranty of neutral property amounts to an engagement, that it shall be accompanied by all the documents required by belligerents to entitle it to protection as such. It is sufficient, however, for the plaintiff in the first instance to give general evidence of neutrality, leaving it to the defendant to show probable cause to suspect that the necessary papers were wanting; in which case the burden of proof will be thrown upon the plaintiff. *Ludlow v. The Union Insurance Company.* ii. 119
 4. If the survey and condemnation of a vessel state certain facts which amount to general unsoundness, the underwriters upon a policy which contains a clause, that "if the vessel after regular survey should be condemned for being unsound or rotten, the insurers shall not be bound to pay their subscriptions," are discharged. *Steinmetz v. The United States Insurance Company.* ii. 193
 5. Insurance from *New York to Bremen*, "with liberty to enter a *Dutch* port when informed on arriving on that coast, that it may be done with safety." On arriving off the coast of *Holland* the captain was informed that, "*Amsterdam* was not blockaded, and that he might enter that port free from molestation by *British* cruisers." He then took a pilot on board and stood for the *Texel*, and was captured near the first buoy, about nine or ten miles from the entrance into the *Texel* roads, by a French privateer, by which he was carried into *Amsterdam*. The vessel and cargo were afterwards condemned, *Held*, that the information received by the captain did not warrant him in proceeding to the *Texel*, and that the departure from the course of the voyage to *Bremen* was a deviation which discharged the underwriters. *Duerhagen v. United States Insurance Company.* ii. 309
 6. If the agent of the consignees accept the cargo at a port short of the port of destination, and pay the whole freight, the underwriters are not answerable, either for the expense of transporting the goods from that port to the port of destination, or for insurance effected by the consignees from one port to the other. *Law v. Davy.* ii. 553
 7. The law implies no warranty of sea-worthiness, except at the commencement of the voyage. Therefore, where a vessel which has received damage, from a peril insured against, puts into port to repair, the captain or agent, who superintends the repairs, is only bound to use due diligence. It is not necessary that the vessel should at all events be so repaired, as to render her sea-worthy. *Peters v. Phoenix Insurance Company.* iii. 25
 8. Where a vessel in the course of the voyage, has suffered damage to the amount of fifty per cent., the assured is entitled to recover for a total loss, notwithstanding she has performed her voyage, and been moored twenty-four hours in safety in the port of destination. *Ibid.*
 9. A seizure of American property by the French at Hamburg, for a violation of a decree of the Emperor Napoleon, not known to the assured, prohibiting trade in certain cases, which seizure was made at a time when Hamburg was under the control of the French arms, but when the Emperor did not occupy it as an enemy, nor dissolve the government, but permitted the senate to exercise their functions, and the American consul resided there, in pursuance of which seizure the property was confiscated, by order of the Emperor, *held*, not to be within the warranty of the assured, against loss arising from seizure or detention, for or on account of any illicit or prohibited trade. *Smith v. Delaware Insurance Company.* iii. 74
 10. Query, Whether a seizure by virtue of such decree, within the French territory, and a general confiscation of all property in a similar situation by order of the Emperor in person, his tribunals not being permitted to take cognizance of it, is within the true intent of this warranty? *Ibid.*
 11. To bring a case within this warranty, there must be both a seizure and an illicit or prohibited trade. *Ibid.*
 12. The prohibition must be a legal one; such as the prohibiting power had a right to make. *Ibid.*
 13. Insurance on goods from *St. Thomas*' to *Laguaira*, and back, "warranted by the assured, free from any charge, damage or loss, which may

- arise in consequence of seizure or detention of the property, for, or on account of any illicit or prohibited trade." The vessel was captured by a Spanish privateer, within half a league of the Spanish coast, and rather more than a league from Lagaira, and carried into Porto Cabello, where the goods were condemned under the decree of Aranguer, of the 19th of *February*, 1809, which adopted the Berlin decree of the 21st of *November*, 1806, forbidding trade, in British merchandize, and declaring all merchandize belonging to England, or coming from its manufactories and colonies, lawful prize. *Held*, that this was not a loss, by seizure for illicit or prohibited trade, within the warranty. *Fau-del and another v. The Phoenix Insurance Company.* iv. 29
14. A neutral, after notice of a blockade, may export the cargo on board his ship, or even in lighters, for the purpose of being conveyed to his ship; but not a cargo purchased and deposited in store before such notice. *Olden v. M^r Chesney.* v. 71
15. A permission to sail obtained of the commander of a blockading force by fraud or falsehood is of no validity; but if obtained under knowledge on his part of the circumstances, it is no breach of blockade unless manifestly in violation of an order from the sovereign of such commander, known to the world. *Ibid.*
16. A neutral ship ought not to be condemned for breach of blockade, if other ships under the same circumstances have been permitted to depart. *Ibid.*
17. Whether an abandonment of a vessel insured has been waved, may be a question of law, or a mixed question of law and of fact according to circumstances; and in the latter case it is properly a matter to be submitted to the jury. *Curcier v. The Philadelphia Insurance Company.* v. 113
18. Where a vessel was insured from Philadelphia to Kingston, (Jamaica,) and a port in the Island of Cuba, and being seized at Jamaica, an abandonment was made which the insured refused to accept; but agreed that the voyage home should be insured: the vessel, afterwards being released on security given by the plaintiff's agents at Jamaica, they without notice to the defendants, purchased a cargo and freighted the ship to St. Jago de Cuba, and thence to Trinidad in Cuba, whence she returned to Philadelphia, and was sold at auction, and there was no evidence of any intention to waive abandonment, or suspicion of unfairness: *held*, that the jury were right in finding for the plaintiff on the ground that there was no waiver of the abandonment. *Ibid.*
19. After abandonment, if it turns out to be legal, the insured is to be considered as agent for the insurer, so that he may employ the ship to the best advantage. *Ibid.*
20. What constitutes a double insurance. *Peters v. The Delaware Insurance Company.* v. 473
21. An insurance on a ship, is an insurance of the ship for the voyage, not an insurance of the ship and the voyage. Therefore, where the ship was insured from Philadelphia to Corunna, and was captured and sent to Plymouth and the voyage broken up; but before the expiration of the sixty days, within which the insured was restricted from abandoning, she was restored, and repaired at the insurers and afterwards arrived at Boston, but the captain was obliged to sell the whole cargo at Plymouth, *held*, that the insured had no right to recover for a total loss. *Ritchie v. The Delaware Insurance Company.* v. 501
22. That the insured may abandon when the damage exceeds one-half the value of the ship, is a general principle; subject however to exceptions. If the insurer will undertake to repair the damage though exceeding one-half the value, he may do it, and the insured shall not abandon. *Ibid.*
23. The defendants having, upon the exhibition of a letter from the captain of a ship, stating that she was at Grass Island, which is within the port of Limerick, but at the distance of about nine miles from town, insured the vessel from Limerick to Philadelphia, the jury decided that she was at Limerick, according to the representation of the plaintiffs, and the understanding of the defendants; and the court refused to set aside the verdict. *Bell and another v. The Marine Insurance Company.* viii. 98
24. Insurance at and from Philadelphia to Cork, and back to Philadelphia. The vessel arrived at Cork

and afterwards proceeded to Limerick. On this fact being made known to the underwriters, a new agreement was entered on the policy, in the following words: "It being represented by the assured, that the *Amiable* was ordered from Cork to Limerick and had arrived there, it is hereby agreed, that for a further consideration of one per cent. to us paid, we engage to see the said ship from thence instead of Cork, back to Philadelphia." A loss having happened while the vessel was in the port of Limerick, it was *held*, that it was covered by the new agreement.

Ibid.

25. On the 3d of *July*, 1818, A. who was going out supercargo of the ship *America*, on a voyage from New York to the Isle of France and Calcutta and back, by a writing reciting that he was indebted to B. in 2500 dollars, engaged to ship and consign to B. goods to that amount, arising from his outward commissions, and in case of death or any accident happening to him, assigned his commissions on the above voyage, and the proceeds thereof to B., and by another writing of the same date authorized B. to make insurance for 2500 dollars on his commissions out, and the proceeds thereof out and home. On the 10th of *July*, A. caused insurance to be made in New York for 4000 dollars for himself on commissions out and home, and delivered the policy to C. On the 15th of *August* B. had insurance made by the defendant in Philadelphia, for 2500 dollars on commissions of A. valued at the sum insured out, and on the proceeds of said commissions as interest might appear, homeward, with the usual clause, as to a prior insurance. On the voyage home the ship was wrecked and A. drowned: but B. received an invoice and bill of lading of goods consigned to him on account of A. by the ship, amounting to 1500 dollars; some of the goods were saved, and claimed and removed by the New York underwriters, who paid part of their policy on a compromise with C. *Held*, 1. That this was not a case of double insurance, that at New York and that at Philadelphia being on account and for the benefit of different persons.

2. The plaintiff had an insurable interest.

3. He was not bound to disclose to the

defendants the particular nature of his interest. *Wells v. The Philadelphia Insurance Company.*

ix. 103

26. A valuable policy of insurance was made of supposed profits on a cargo of goods on a voyage from Canton to Philadelphia free from average, and without benefit of salvage. The ship sailed from Canton with a cargo, but in consequence of bad weather, put into the Isle of France for repairs; part of the cargo was so much damaged that it was thrown overboard; part being also damaged was sold, and the proceeds re-invested; and these with the sound part arrived at Philadelphia; where it was found that part of those considered sound was damaged. The sound teas were sold at a considerable profit, but on the whole cargo there was no profit, and there was a loss of more than fifty per cent. on the whole goods shipped. *Held*, that the underwriter was discharged. *Walsh v. Thompson.*

ix. 115

27. The holder of a policy of insurance with whom it has been deposited as security has a lien on it at law: and if he receives the proceeds, has the right to retain them against one whose equity is not better than his own. *Wells v. Archer.*

x. 412

28. If a vessel lying at anchor, be in danger of being driven ashore in a dangerous place by a storm, and the captain in order to avoid the danger, after consultation, cut the cables, and hoist sail, for the purpose of getting out to sea, or, if that be impracticable, of going ashore elsewhere; but in consequence of the sail being carried away, the vessel becomes ungovernable, goes ashore and founders, it is not a case of general average, except so far as respects the cables and anchors; and the insured is entitled to recover for a total loss.

Walker v. The United States Insurance Company.

xi. 61

29. Insurance on freight valued at seven thousand five hundred dollars. The vessel was captured and carried into Bermuda, where both vessel and cargo were condemned. The insured appealed and obtained restitution of the vessel, and made a compromise with the captors, by which he obtained two-thirds of the proceeds of his goods (the goods having been sold by order of the Court of Admiralty at Bermuda,) and the other fourth was retained

by the captors. Soon after receiving intelligence of the capture, the insured abandoned, and was paid for a total loss. The goods of the insured occupied two-thirds of the tonnage of the vessel, the rest belonging to other shippers. In adjusting the freight, under these circumstances, the insured is not bound to make good to the insurers, the whole amount at which the freight was valued. *Dumas v. The United States Insurance Company.* xii. 437

30. Query, What would be the rule if the insured were the sole shipper, and especially if the ship were filled.

Ibid.

31. Insurance on goods, at and from Teneriffe to Sourabaya, and thence to Philadelphia, by a policy, insuring, among other risks, against "all unlawful arrests, restraints, and detentions, of all kings, princes," &c.; and containing a warranty, by the insured, of neutrality. The ship, being between sixty and one hundred miles from Sourabaya, was boarded by an officer of a British frigate, belonging to a squadron then blockading the island of Java, and warned not to enter any port in the island of Java or Madeira. On the following day, the vessel made another attempt to enter the port of Sourabaya, when she was chased off, and again taken possession of by the same frigate, and after a detention of three days, dismissed, with orders to depart immediately, and an assurance that, if again found hovering on the coast, the ship would be captured, and the crew impressed. She proceeded to the Isle of France, to refit, &c., and then returned to Philadelphia. *Held*, that if the word "unlawful," had not been introduced into the policy, the blockade would have been a restraint of princes, which would have entitled the insured to recover for a total loss. *Thompson v. Read.* xii. 440

INTEREST.

- See ADMINISTRATOR, 3, 4, 5. ASSUMPSIT, 1. COUNTY COMMISSIONER, 5. EJECTMENT, 16. EXECUTION, 25. EXECUTORS AND ADMINISTRATORS, 24. FOREIGN ATTACHMENT, 10. GUARDIAN AND WARD, 2, 3, 4, 8, 9. IMPROVEMENT, 18. LEGACY, 18. USURY.
1. The testator devised to his wife E. all the tract of land on which he

lived, for life, she committing no waste therein, and bequeathed her one hundred pounds in money, and specific legacies, and then devised as follows: "all which the said E. may dispose of as she sees cause, except the above mentioned tract of land, which said land I allow to be sold after her decease, and the price, with what money may be on hand, and indebted to me, (after paying the following legacies and funeral expenses,) I allow to be laid out in building a Dutch Lutheran church, where it will be most convenient to this place." His executors received various debts, with the interest up to the time of payment. An act of assembly, afterwards passed, which directed that the interest on any money thus bequeathed, for the building of a Dutch Lutheran church, yet in the hands of the executors, should be appropriated to the maintenance of the widow. *Held*, that the executors were chargeable with the interest, actually received by them, on the aggregate of debt and interest in their hands, whether such interest was received before or after the making of the act of assembly, and that such part of that interest, as accrued during the life of E., should go to her, or her executors. They were chargeable, also, with interest on the money not put out, if they used it on their own account. *Findley v. Smith.*

vii. 264

2. Interest upon the amount of a contribution, for general usage, runs from the time the money was advanced, upon which the average arose. *Sims v. Willing, and others.* viii. 103
3. In *Pennsylvania*, interest is incident to all judgments. *The Commonwealth, for the use of Bellas, v. Vanderslice and another, administrators of Miller.* viii. 452
4. Interest is to be calculated on a judgment to the time when the first payment is made on account, which is to be applied, in the first instance, to discharge the interest, and afterwards, if there be a surplus, to sink the principal, and so *toties quoties*; care being taken that the principal, at any time thus reduced, be not suffered to accumulate by the accruing interest. *Ibid.*
5. Where the estate of a decedent is not sufficient to pay both the debts by specialty and by simple contract,

- the creditors by specialty are entitled to interest on their debts, to the time when the assets are apportioned. *Shultz's Appeal*. xi. 182.
6. Where an account between the commonwealth and a sheriff was stated by the auditor general, showing a large balance due to the commonwealth, which was approved by the state treasurer, but the sheriff himself never presented an account for settlement, and had no previous notice of the statement of the account by the auditor general, and that officer, in transmitting the account to the deputy attorney general, with instructions to bring suit on the sheriff's official bond, stated that the amount would probably be greatly reduced, by credits to be produced by the sheriff, in consequence of which a correspondence was opened between the auditor general, and the sheriff, which resulted in a reduction of the balance, nearly one half the original amount; *held*, that the commonwealth was not entitled to interest on the balance thus reduced, under the 35th section of the act of the 30th of *March*, 1811. *The Commonwealth v. Fittler's Administrator*. xii. 277
7. Where there is no usage nor precise time of payment, no account rendered, nor demand made, it is for the jury to give interest, by way of damages, for the delay, at their discretion, under all the circumstances of the case. *Eckert v. Wilson*. xii. 393

INTERROGATORY.

See DEPOSITION, 12, 20.

A leading interrogatory is, where it is expressed in such a manner as to indicate to the witness the answer which it is wished he should make; and if there be no such indication, the interrogatory is fair. *Selin v. Snyder*. vii. 166

INTESTATE.

See ADMINISTRATOR, 13, 14. INQUEST, 2. ORPHANS' COURT. PARTITION, 1, 2, 3.

1. On a sale of the intestate's lands, by order of the Orphans' Court, for the payment of debts, creditors by judgment, against the intestate, are to be paid according to priority in date of their judgments. *Girard v. McDermott*. v. 128
2. On the death of a person, intestate, leaving no widow, nor lawful issue, but a father, and brothers, and sisters, the remainder, in fee, vests in the brothers and sisters, under the 6th section of the act of 19th *April*, 1794, at the same instant that the life estate passes to the father. *McComb v. Dillo*. v. 364
3. Therefore, a person who has married one of the sisters, cannot be a witness in favour of the father in an ejectment for land, that descended from such intestate, though he has released all his interest in possession, remainder, or reversion, in his own right, or the right of his wife. *Ibid*.
4. The widow of an intestate, cannot join with the heirs in bringing ejectment for the lands of the deceased. *Pringle v. Gaw*. v. 536
5. If she join with the heirs in ejectment, the heirs cannot recover judgment alone. *Ibid*.
6. If one die intestate, leaving sons and daughters, and also grandchildren, the children of the eldest son of the intestate, who died in the lifetime of his father, the grandchildren, who represent the first born son, are entitled to take the real estate of the intestate at an appraisement, under the 22d section of the act of the 19th of *April*, 1794, in preference to the eldest son then living. *Hersha v. Brenneman*. vi. 2
7. Under the intestate laws of *Pennsylvania*, if a man die intestate, leaving neither widow nor lawful issue, nor father, nor brother, nor sister, but leaving a mother, real estate, acquired by his father, and descending to him, goes to the relations on the part of the father, in exclusion of the relations on the part of the mother, in equal degree. *Bevan v. Taylor*. vii. 397
8. Surplus money, arising from the sale of land by the Orphans' Court, whether it belong to an infant, a *feme covert*, or a male of full age, is to be considered simply as money. *Grider v. McClay, Administrator of Grider*. xi. 224
9. Therefore, where one died intestate, seised of land, but not leaving personal estate sufficient to pay his debts, &c., and the land was sold under a decree of the Orphans' Court, for that purpose, and a surplus remained, which was paid to the guardian of the intestate's only

child, who died in infancy; it was held, that the said surplus was to go to the personal representatives of the infant, and not to his heir. *Ibid.*

10. A judgment creditor, of an insolvent intestate, cannot gain a priority over other judgment creditors, by taking out against him, and levying on his goods a *fi. fa.*, which relates to a day prior to the intestate's death. Such *fi. fa.* and levy are good, where the estate is solvent. *Leifer v. Lewis et al.* xv. 108

INTESTATE LAW.

See DESCENT. DEVISE, 5. GUARDIAN AND WARD, 9. INTESTATE, 1. ORPHANS' COURT.

INNUENDO.

See SLANDER, 16.

ISLANDS.

1. If an improver of an island, in the river *Allegheny*, apply for it, under the act of the 27th of *January*, 1806, within three years, and procure the appointment of valuers, by the board of property, and a valuation, and remain on it eight years without taking any further steps; *query*, whether he had a right to it then, on paying the purchase money and interest.

A warrant, granted at the end of the eight years, without any new valuation, to a different person, who paid the purchase money, is void, notwithstanding the board of property decided in his favour, on a caveat, by the improver. *Hunter v. Howard.*

x. 243.

ISSUE.

See PLEADING.

1. If no issue is joined in the court below, it is error. *Emerick v. Weaver.* iii. 91
2. In covenant, if defendant pleads covenants performed, and entry is made on the docket, *and issue*, it is to be considered as a direction to the prothonotary to make a formal entry of the issue, and the omission to do so, is merely a clerical error. *Hanna v. Burkholder.* vii. 282
3. The words, "and issue," on the docket, suffice to cure any defect of form in joining issue. *Carl v. The Commonwealth.* ix. 63

JAIL.

See COUNTY COMMISSIONERS, 9.

JEOFAILS.

See AMENDMENT, 14, 15, 16, 17, 18, 19, 20.

JOINT BOND.

See BOND, 1.

1. After verdict, the want of a verification, in the assignment of breaches, on a bond, is cured by the statute 4 and 5 *Ann.*, c. 16. *Carl v. Commonwealth.* ix. 63
2. A verdict cures the omission, in such breaches, to state that assets came to the administrator's hands. *Ibid.*

JOINT CONTRACT.

See CONTRACT, 1.

1. In *assumpsit*, against two, upon a joint contract, if one of the defendants confess a judgment, for a certain sum, and the other plead the general issue, go on to trial, and a verdict pass against him for a smaller sum, judgment cannot be entered for such defendant, but the judgment confessed, will stand against him who confessed it. *Williams v. McFall.* ii. 280

JOINT SUIT.

1. If two are jointly sued and summoned, and only one appears, the course is to take judgment by default against the one not appearing, to declare against both, and try the issue tendered by the other.
- If two are summoned, and one only appears, and tenders an issue, and verdict and judgment are against both, the party not appearing cannot complain in error, till execution is taken out against him. *Marshall v. Gougler.* x. 164
2. Two distinct firms A. B. and C. D., became sureties for E. F., and they all joined in giving a joint and several note, for the debt of E. F.; A. B. and C. D. cannot jointly recover against E. F., on proving a payment, made by them, of the note, without also proving that such payment was made out of the joint funds of A. B. and C. D. *Boggs v. Curtin.* x. 211
3. In an action on a single bill, declared on, as given to A. B. & Co., if the defendant goes to trial on *non est factum*, and payment, he cannot avail himself, at the trial, of the objection that all the company, who are plaintiff's were not named in the writ. *Porter v. Cresson.* x. 257

JUDGE.

See BILL OF EXCEPTIONS, 4.

1. Where a judge delivers an opinion, upon matter of law, he is bound, by

the act of the 24th of *February*, 1806, section 25, if requested, to reduce his opinion, with his reasons for it, to writing, and file it; but he is not bound to reduce to writing *his whole charge to the jury*, and file it. *Reigart v. Ellmaker*. xiv. 121

2. A judge is not bound, by the act of the 24th of *February*, 1806, to file of record his whole speech to the jury. *Munderbach v. Lutz*. xiv. 125

3. Nor is he bound, at the request of the party excepting, to annex to the record a copy of the evidence taken by him, and transcribed by the party making the request. But it is the duty of the judge, if requested, to permit so much of the evidence as may be necessary to understand his opinion, to be placed upon the record. This request should be made immediately on the delivery of the opinion, and the statement of the evidence should be prepared by the counsel, and submitted to the court, in the same manner as in a bill of exceptions. *Ibid*.

JUDGMENT.

See ADMINISTRATOR, 17. AMENDMENT, 10. APPEAL, 22, 23, 24. ASSIGNEES, 2. ASSUMPSIT, 26. ATTACHMENT, FOREIGN, 12. AWARD, 22. DEBT, 5. DISCONTINUANCE, 1. ERROR, 44, 87, 107. EVIDENCE, 178. EXECUTORS, 5, 6. INTEREST, 8, 9. JUSTICE OF THE PEACE, 2, 5, 9, 10, 11, 31, 36. LIEN, 6, 12. LIEN OF JUDGMENT. MORTGAGE, 4, 5, 7, 12, 13. PRACTICE, 15, 20, 21, 25, 29, 31, 32, 34. RECOGNIZANCE, 15, 18. RECORD, 5. REFEREES, 1, 2. RESTITUTION, 1, 2, 3. SCIRE FACIAS, 2, 3, 5, 6, 8, 9, 10, 13, 14, 15, &c. SHERIFF'S SALE, 1, 19, 20.

1. *Query*, Whether a judgment against a vendor, obtained subsequently to articles of agreement for the sale of land is binding on such land? *Poster v. Foust*. ii. 11

2. If however by such articles the whole purchase money is to be applied to the discharge of judgments prior to the articles, and is so applied, judgment subsequent to the articles is not binding on the land. ii. 11

3. If the vendee pays such judgment after execution, without defending himself against it, or giving notice to the vendor to do so, he cannot recover back the amount in covenant

on a warranty by the vendor in his deed against liens suffered by him. ii. 11

4. Where a judgment is entered against a defendant, to be released on his performance of a certain act, and he neglects to perform that act within a reasonable time, the plaintiff may take out execution, without applying to the court, but the court will interfere in a summary way, should it be necessary, to prevent injustice, and enforce the terms on which the judgment was entered. *Miller v. Milford*. ii. 35

5. Under such circumstances the defendant cannot object that a year and a day have elapsed since the entry of judgment and that no *scire facias* has been issued. ii. 35

6. Upon a confession of judgment, if the plaintiff's demand is in nature of a debt which may be ascertained by calculation, it is sufficient to enter *judgment, generally*. The judgment is supposed to be for the amount of damages laid in the declaration, and execution may issue accordingly; but the plaintiff should indorse upon the execution the actual amount of the debt; and if the defendant complains that injustice has been done, the court, on motion, or a judge, at his chambers, before the return of the writ, upon a proper case being made out, will give immediate relief. *Lewis v. Smith*. ii. 142

7. An agreement to enter judgment as of a particular term, is complied with by an entry of judgment, as of a subsequent term, provided no third person is injured thereby. ii. 143

8. A judgment erroneously entered, is valid until reversed. ii. 143

9. Before verdict, the plaintiff filed a stipulation agreeing to the appointment of auditors to ascertain the purchase money of a tract of land, in case judgment should be in his favour. Auditors were appointed who made report, the defendant not taking part. *Held*, that these proceedings did not invalidate the judgment. But it would be exceeding the court's power to compel the defendant to accede to such proceedings. *Bassler v. Niesley*. ii. 352

13. Debt on a bail bond is not within the act of the 21st of *March*, 1806, authorizing judgment by default, in case the defendant does not make a statement or defence agreeably to the provisions of that act. *Boas v. Nagle*. iii. 230

11. It seems, the act is confined to cases where the cause of action is a bond conditioned for the payment of money, and not a bond with a collateral condition. *Ibid.*
12. A lease made to one and his heirs for forty-nine years, reserving to the lessee a privilege of building, with a covenant by the lessor to purchase the improvement at the end of forty-nine years, or convey to the lessee, his heirs and assigns, the land at a valuation: the lessee afterwards erects valuable buildings: held to be such an interest as is bound by a judgment against the lessee. *Ely v. Beaumont.* vi. 124
13. The validity of a judgment entered after two *nihil*s upon *scire facias* against the mortgagor, cannot be impeached in an ejectment by the purchaser at a sheriff's sale under such judgment, though it appear in evidence, that the mortgagor was living on the land at the issuing and return of the two writs of *scire facias*. *Colley v. Latimer.* v. 211
14. If such judgment is erroneous, it must be reversed by writ of error. *Ibid.*
15. In an action of debt, a judgment by default must be for the sum demanded by the plaintiff's declaration, though he may have required bail in a smaller amount. *Boaz et al. v. Heister.* vi. 18
16. In an action of debt on bond against two defendants, one entered special bail and the writ was returned *non est inventus* as to the other. The plaintiff, however, declared against both jointly and entered judgment by default against both, which this court held to be erroneous and it was reversed accordingly. *Ibid.*
17. Where a judgment is for two distinct matters, one regular and the other erroneous, *e. g.* where the judgment is for the debt and costs, and no costs are given by law, that which is erroneous may be reversed, while that which is regular is affirmed. But where a judgment is entered jointly against two, which is erroneous as to one, it cannot be reversed as to one and affirmed as to the other. *Ibid.*
18. Where on a plea of *nul tiel record*, the court decided that there was such a record, but in consequence of the mistake of the prothonotary, judgment was omitted to be entered; after which the defendant died; it was held that the court might in order to do justice, enter judgment as of the time when it ought to have been entered, although nearly eight years had elapsed; provided, third persons were not injured thereby. *Murray v. Cooper, for the use of Taggart.* vi. 126
19. A judgment against one, who, though named as a defendant in the writ, was not taken, and never became a party to the suit, is erroneous. *Curtis and another v. Patton and others.* vi. 135
20. A. entered into a bond in a certain sum to B. to be paid "at some time within the term of partnership, viz. ten years from the date of the articles of partnership between the said A. and the said B. and C." and in the same instrument, he gave a warrant of attorney to confess judgment on the bond, but judgment was not entered on the record "except upon the dissolution of the partnership or upon the death of the obligor. Held, that on the dissolution of the partnership referred to in the bond, the obligee was entitled to enter judgment and issue execution. *Gorman v. Richardson.* vi. 163
21. After a judgment has been entered on a bond, by virtue of a warrant of attorney, a judgment entered on the same bond under the same warrant, in another county is irregular. Such judgment, however, is not void, for if a sale has been made under it, the purchaser from the sheriff has a good title. The attorney who entered such judgment, or the obligee, if it was entered by him, is answerable for the consequences. *Martin v. Rex.* vi. 296
22. An irregularity in the proceedings in a *scire facias* on a mortgage, as that judgment was entered after the return of one *nihil*, cannot affect the competency of the judgment, or of the sheriff's sale upon it, when offered in evidence in another suit. *Allison v. Rankin.* vii. 269
23. An entry by the prothonotary on his docket of a suit, and that a judgment bond was filed of record therein, stating the particulars of it, and the date of entry, is a good entry of a judgment under the act of the 24th of February, 1806. *Helvete v. Rapp.* vii. 306
24. The law does not positively presume payment of a judgment after nineteen years; that is a question for the jury. *Lesley v. Nones.* vii. 410

25. If, after judgment, another claimant appear in opposition to the *cestui que use* marked on the docket, the court below may stop the payment till the respective rights of the claimants are ascertained, even after the judgment is affirmed and the record remitted. *Byrne v. Walker.* vii. 483
26. It is discretionary with the court before whom the cause is tried, to open the judgment, in a case in which one party filed a paper, offering, if the verdict should be in his favour, to be bound by certain terms, which the other party did not accept: and this court cannot interfere with their decision. *Bower v. Blessing.* vii. 243
27. On the reversal of a judgment, this court will award restitution only of what the defendant in error has actually received. If therefore, land has been sold by the sheriff, for a small sum, subject to the claim of the plaintiff, as ascertained by a verdict and judgment, which has been removed to the Supreme court, by writ of error, and the plaintiff purchases it of the sheriff's vendee, and obtains possession, this court will not order restitution, of the amount subject to which the land was sold, as well as the price paid for it. Nor will they award a *scire facias*, to show cause why this should not be done; nor will they grant to the plaintiff in error, such relief as to justice may appertain, where no specific relief is applied for. *Cassell v. Cooke.* viii. 296
28. A judgment binds lands, for the sale of which articles of agreement have been entered into before the judgment, but which have not been conveyed until afterwards. The rule that after purchased lands are not bound by judgment is to be strictly construed, and not extended beyond the letter. *Richter v. Selin.* viii. 425
29. A judgment entered by the prothonotary, in pursuance of an agreement that an amicable action shall be entered, and that the prothonotary shall enter judgment against the defendants in a certain sum, is valid: and it is not necessary that there should be a confession of judgment, in writing by the defendants, expressing the amount due to the plaintiff. *Cook and another v. Gilbert.* viii. 567
30. A paper authorizing the prothonotary to enter judgment, need not be under seal. *Ibid.*
31. When it appears by the record, that after the return of summons, a rule was entered to declare, and after declaring the plaintiff entered a rule to plead, and signed judgment for want of a plea, the judgment is regular. *Shaffer v. Brobst.* ix. 85
32. A party, on taking a bond and warrant, agreed by a separate writing not to enter up judgment, nor get it done by any body else. He afterwards assigned to another for a valuable consideration, without notice of the agreement, who entered up judgment. *Held, 1.* That the judgment was valid.
2. That the obligee was a good witness to prove that the assignee had no notice of the agreement. *Davis v. Barr.* ix. 137
33. A judgment recovered against one partner is a bar to a subsequent suit against both; though the new defendant was a dormant partner, at the time of the contract, and was not discovered till after the judgment. *Smith v. Black.* ix. 142
34. On affirmance of a judgment in the Supreme Court after a writ of error, interest is to be charged on the judgment below till affirmance, and then the aggregate is to bear interest. *McCausland's Administrators v. Bell.* ix. 388
- But the plaintiff cannot in such case, charge interest on the costs of suit until he pays them; though on payment he may charge interest from that time. *Ibid.*
35. The judgment creditors of a vendee of land who has paid part of the purchase money and has possession of the land, but has received no deed, are entitled to the proceeds of the sale of his title, under an execution, in preference to the vendor. *Auwerter v. Mathiot.* ix. 397
36. On the replication *quod habetur tale recordum* and issue, where the record is a record of the same court, the mere entry of the judgment by the court, without fixing a day, though informal, is regular under our practice. *Shore v. Hunt.* ix. 404
37. In a suit on a judgment in the court of another state, the pleas of fraud in obtaining it, imposition, mistake, and want of consideration, are bad on demurrer. It seems *nul tiel record* is the only plea of which the defendant can avail himself.
- Interest on a judgment in another

- state, cannot be recovered on a count for such interest in a suit on the judgment. *Benton v. Burgot.* x. 240
38. In ejectment by a mortgagee to recover premises sold under a judgment on his mortgage, evidence is not admissible to show that the *scire facias* on the mortgage which was returned served, was not served. Nor is evidence admissible to show, that the mortgage money for which judgment was recovered by default, was paid. *Blythe v. Richards.* x. 261
39. An insolvent debtor made a general assignment on the 24th of November, 1819, indebted to C. on a judgment obtained against him on 1st of April, 1818, to the plaintiff on a mortgage given the 18th of May, 1819, and to the United States on judgments for duties rendered the 16th of August, and 15th of November, 1819. *Held*, that C. had the prior right to the monies in court, raised by a sale of the mortgaged premises under a *levari facias*. *Wilcocks v. Wain.* x. 380
40. If one owning several tracts of land, bound by a judgment against him, sells one tract to A., the remaining tracts being more than sufficient to pay the judgment, and afterwards sells one of the remaining tracts to B., who has notice of the circumstances, if B's tract is taken in execution, and the judgment satisfied by the sale of it, B. cannot maintain assumpsit on an implied promise against A. for contribution. *Nailer v. Stanley.* x. 460
41. *Query*, Whether the regularity of a judgment can be inquired into in another suit, between the plaintiff in the judgment, and the alienee of land bound by it? *Anderson et al. Executors of Porter v. Neff.* xi. 208
42. A judgment creditor, who has taken in execution the goods of his debtor, cannot afterwards discharge them from the execution, and continue his judgment in force as to the land of the debtor. *Hunt v. Bredding.* xii. 37
43. Where therefore a judgment creditor, who has taken his debtor's goods in execution to the value of the debt, and permitted them to remain in his possession, as appeared by the sheriff's return, agreed to set aside his levy, and, in consideration of being paid the amount of his judgment, to assign it to a subsequent judgment creditor, who at the same time received from the debtor, in payment of his own debt the goods which had been levied on in satisfaction of the judgment assigned to him, it was *held*, that the first judgment was satisfied, and that the assignee of that judgment was not entitled to be paid out of the money arising from the sale of the debtor's lands in preference to an intermediate judgment creditor. *Ibid.*
44. The 21st section of the act of the 20th of March, 1810, which provides that "no judgment shall be set aside in pursuance of a writ of *certiorari*, unless the same be issued within twenty days after the judgment was rendered," applies only to civil actions. *Caughey v. The Mayor, &c. of Pittsburg.* xii. 53
45. Where a summons issued against A. and B., which was returned, "summoned as to A. and *non est* as to B.," and the name of an attorney was entered in the docket opposite the names of the two defendants, but the plaintiff declared against A. alone, averring that the writ had been returned *nihil* as to B., and on the same day entered a rule of arbitration, and the arbitrators, after having heard the proofs of the plaintiffs, and in no part of the record it was expressly said, that B. appeared, or was heard in the cause, *held*, that the judgment entered on the award was not a judgment against B. *Erdman v. Stahlnecker.* xii. 325
46. A judgment entered generally, is not to be considered as a judgment by confession, where the writ is in debt not exceeding five hundred dollars, special bail in that sum, and the defendant took an early opportunity to have the judgment opened. *Zerger v. Gonter.* xiii. 58
47. A *fieri facias*, regularly issued and returned by the sheriff, levied on a particular tract of land of the defendant, preserves the lien of a judgment beyond the five years, though no *scire facias* be issued.
- Query*, Whether such lien would continue beyond twenty-one years.
- Query*, Whether a *fieri facias* regularly taken out, but not levied, continues the lien of the judgment beyond the five years. *The Commonwealth v. McKisson.* xiii. 144
48. Judgment may be entered up by the prothonotary upon a written order, sent to him by the defendant, confessing judgment in an action of

- debt and directing him to enter judgment against him.
- The assent of the plaintiff to such judgment may be presumed. *M'Calmont v. Peters.* xiii. 196
49. On a plea by the defendant of a former judgment in his favour, in the Court of Common Pleas in another county, it appeared that the plaintiff brought suit before a justice of that county, and recovered seventy dollars; the defendant appealed, and obtained judgment in the Court of Common Pleas for one hundred and seventy dollars: *held*, though this judgment was erroneous, for want of jurisdiction in the magistrate it was not void, and that the plea was good. *Hinds v. Willis.* xiii. 213
50. If, for the same cause of action, a suit be brought to recover double the value of the goods wrongfully distrained, and another in case at common law, and there are awards of arbitrators in each, finding no cause of action, and one be appealed from, the award not appealed from may be pleaded in bar in the other suit.
- Query*, Whether a prior judgment in the latter may not in the former suit, be given in evidence on the general issue, or if the court would not relieve on motion. *Garvin v. Dawson.* xiii. 246
51. Suit on a joint and several bond against both obligors, one of whom only was served, and judgment had against him: such judgment is a bar to another suit, against the obligor not served.
- A legislative remedy ought to be provided for cases of this description. *Downey v. The Farmers and Mechanics' Bank of Greencastle.* xiii. 289
52. A judgment by default against a defendant, who has been arrested and given bail to the sheriff, but not entered special bail, is irregular. *Foreman v. M'Ferrin.* xiii. 290
53. After the lapse of twenty years a judgment is presumed to have been satisfied unless there are circumstances to account for the delay. *Cope v. Humphreys.* xiv. 15
54. If there are no such circumstances, it is not the duty of the court to submit the question as an open one to the jury. Satisfaction of the judgment is a presumption of law upon the facts. *Ibid.*
55. If the original judgment was against several defendants, and on a *scire facias post annum et diem*, the return as to one of the defendants is *nihil habet*, and judgment is entered against him by default, this is not a circumstance to affect the presumption of payment. *Ibid.*
56. Where judgment has been confessed in one county, on a bond by virtue of a warrant of attorney, the power is satisfied; and another judgment cannot be confessed on the same bond, by virtue of the same warrant, in another county. But this cannot be taken advantage of on a writ of error. The court in which the second judgment is entered, will, under ordinary circumstances, vacate it. But how far the court will exercise their discretionary power to let in the subsequent judgment of a third person, *query*. *Neff v. Barr.* xiv. 166
57. Where two judgments have been entered, by virtue of the same power in different counties, and an issue is directed by the court in which one of the judgments is entered, to determine whether or not, that judgment be valid, the party who alleges that it is not valid, may give in evidence an entry in the docket, stating the hour and minute when the judgment was entered, if it appear from other evidence that such entry was made by the opposite party, or his agent. But *it seems*, that the burden of showing which of the judgments was first entered, properly lies on him by whom they were entered. *Ibid.*
58. The time during which a judgment continues to be a lien upon lands, under the act of the 4th of April, 1798, is to be determined by the record alone, without regard to any private agreement for a stay of execution, not appearing upon the record. *Bombay v. Boyer.* xiv. 253
59. It is not against equity, that a purchaser should insist on counting the five years from the date of the judgment, although he was informed before he made the purchase, that by the condition of the bond, or a private agreement of the parties, execution could not be issued on the judgment, until a time less than five years before his purchase. *Ibid.*
60. A purchaser at sheriff's sale under a judgment, does not take the land subject to a previous judgment, obtained against the former owner of the land, unless it was sold expressly subject to such prior judgment. *The*

Commonwealth v. Alexander.

xiv. 257

61. Where therefore, money is in the hands of the sheriff, arising from the sale of land under a judgment obtained against the present owner, creditors who have liens upon the land, by virtue of judgments obtained against the former owner, are entitled to payment out of this fund; and if the sheriff, instead of satisfying such liens, pays over the balance of the purchase money to the defendant in the execution, the previous judgment creditors may recover from him the amount of their respective liens. *Ibid.*

62. Whether the judgment creditor had not lost his lien, in consequence of his attorney having permitted the misappropriation of another fund, out of which he was entitled to payment, properly left to the jury, under the facts and circumstances of the case. *Ibid.*

63. The Court of Common Pleas has no right to set aside a judgment entered upon a verdict without setting aside the verdict also. *Huston v. Mitchell.* xiv. 307

JUDGMENT BY DEFAULT.

See COURT, 19.

The court reversed a judgment by default, entered under the 5th section of the act of the 21st March, 1806, prior to the time allowed by the act for the defendant's appearance. *Wingert v. Connell.* iv. 237

JURISDICTION.

See ATTACHMENT. COURT OF COMMON PLEAS, 1, 2. DISTRICT COURT, 1, 2, 3, 4. JUSTICE OF THE PEACE, 2, 3, 4. MILITIA, 1, 2, 3, &c. SPECIAL COURT. SUPREME COURT.

1. Where a cause was removed from Dauphin to Lebanon county, under the 5th section of the act passed the 16th of February, 1813, erecting certain parts of Lancaster and Dauphin counties into a separate county called Lebanon county, it was held, that the defendant might plead to the jurisdiction of the Court of Common Pleas of Lebanon county, the absence of those facts, which alone could authorize a removal, and that it was error in the court, either to decide summarily in favour of its own jurisdiction, or to disregard the plea in abatement, and permit the cause to be tried on the merits, on a plea in bar. *Stoecker v. Gloninger.* vi. 63

2. Where a cause was removed under the provisions of the above-mentioned act in September, 1815, and no declaration was filed, until February, 1818, it was held, that a plea to the jurisdiction, entered immediately afterwards, was in time; and that an appeal by the defendant from an award of arbitrators, appointed under a rule entered by the plaintiff, and the entry of a rule to take depositions by the defendant, were no waiver of objection to the jurisdiction of the court.

3. Query, Whether the parties were not bound to make their election as to the removal, before the day appointed by the act for the prothonotary to have his docket completed, and the records ready for delivery. *Ibid.*

JUROR.

1. It is gross misbehaviour for any person to speak to a juror, or for a juror to permit conversation concerning the cause, after he is summoned, and before the verdict. *Blaine's lessee v. Chambers.* i. 169

2. The act of the 4th of April, 1809, which authorizes each party to challenge peremptorily two jurors, in all civil cases, does not extend to *viewers*, provided for by the 11th section of the act of the 29th of March, 1805. *Schwenk v. Umstead.* vi. 351

3. A juror not interested in the ejectment to be tried, nor in any land, the title to which depends on the principles to be settled in it, is not liable to challenge for cause on the ground that he is interested in another tract, held by the plaintiff under the same title as that now in suit. *Gratz v. Benner.* xiii. 110

4. It is good cause of challenge to a juror, that he objects himself to being sworn, because he had heard all the evidence at a former trial of the cause, and had made up and expressed his opinion on the facts then given in evidence, but says that his mind is always open to conviction on another state of facts. *Irvine v. Kean.* xix. 192

JURY.

See APPLICATION, 4. CHALLENGE, 1, 2. CONTRACT, 2. COURT, 4. ERROR, 84. EVIDENCE, 330, 333. IMPROVEMENT, 9. LIBERARI FACIAS, 3. NEW TRIAL. ROADS, 4, 5, 6, 7, 8, 10. SURVEY, 4, 5. WRITTEN INSTRUMENT, 1, 2.

1. It is error if it does not appear by the record of a trial of an indictment,

- that the defendant was tried by twelve jurors, lawfully sworn. *Doebler v. The Commonwealth*. iii. 237
2. Each juror is allowed fifty cents on an inquisition on real estate and the sheriff may receive it, but is accountable to the juror for it. *Middletown v. Summers*. iii. 549
 3. If after a rule for a struck jury, a party goes on to trial before a general jury, it is a waiver of the rule for a struck jury; and if he wishes a subsequent trial of his cause to go before such a jury, he must obtain a new rule. *White and another v. lessee of Kyle*. vi. 107
 4. It is no cause of challenge to the array of jurors that the sheriff was not present the whole time during which the selection of jurors was made. *Commonwealth v. Lippard*. vi. 395
 5. That the sheriff and commissioners took up between two and three weeks in making the selection and putting the names of the jurors into the wheels; or *Ibid*.
 6. That it did not appear that the sheriff and commissioners wrote the names of the jury selected by them and put the same into the wheels; this duty having been performed by a clerk in their presence and by their order; or *Ibid*.
 7. That the pieces of paper on which the names were written, were not safely kept between the time of writing and putting them into the wheel; the same having been put into a box where they were kept until the selection was completed, when they were put into the wheels; or *Ibid*.
 8. That the names which were remaining in the wheels at the end of the year, were taken out before the names selected for the new year were put in. *Ibid*.
 9. In capital cases the court has no power, without the consent of the prisoner to discharge the jury, because they have not agreed and declare that they never can agree upon a verdict. *Commonwealth v. Cook and others*. vi. 577
 10. In cases of *absolute necessity*, the jury may be discharged. *Ibid*.
 11. But if the jury have agreed as to one or more of several prisoners, their verdict as to them, ought to be received, though they cannot agree as to the rest, and are, from necessity discharged by the court. *Ibid*.
 12. The jury are to decide on doubtful conversations, how far they amount to recognition of title. *Miller v. Shaw*. vii. 129
 13. An action will not lie before a justice of the peace, for the balance due on a judgment in the Court of Common Pleas. *Eason v. Smith*. viii. 343
 14. If the sheriff who returns the jury, is a brother of one of the parties, it is a good cause of challenge to the array. *Munshower v. Patton*. x. 334
- ### JUSTICE OF THE PEACE.
- See APPEAL. AWARD, 4. CERTIORARI. CONSTABLE, 5. COSTS, 21, 28. COURT, 27. DISCONTINUANCE. EVIDENCE, 39, 176, 225, 373. FORCIBLE ENTRY, 1. LIMITATION, 21. POOR, 1, 2, 3. RECOGNIZANCE, 9, 10, 15. RECORD, 5. SABBATH BREAKERS, 1. SHERIFF'S SALE, 4, 5, 9. SWINE.
1. In a suit before a justice of the peace, it is not necessary to file a declaration, nor is it necessary when the suit is removed to the Common Pleas, and there submitted to arbitrators. *M^eEntire v. M^eElduff*. i. 19
 2. If the judgment of a justice of the peace be for the sum within his jurisdiction, and on an appeal to the Common Pleas, judgment be given for a sum above his jurisdiction, the judgment of that court shall not be arrested unless it appear, that the cause of action was different. i. 19
 3. If the record of the proceedings before the justice, set forth generally the nature of the plaintiff's demand, and it does not exceed one hundred dollars, it is sufficient to show that he had jurisdiction. i. 19
 4. The 14th section of the hundred dollar law, does not authorize a reference to men in a suit before a justice of the peace, where the sum exceeds one hundred dollars. The justice has jurisdiction beyond that sum, only were the parties agree on the sum, or leave it to the justice to ascertain it. *Brenneman v. Greenawalt*. i. 27
 5. In an action of trespass, an alderman or justice of the peace may give judgment for damages without the intervention of referees, if neither of the parties request that they may be appointed. *Shoemaker v. Barry*. i. 234
 6. A seaman, shipped in a British

- port, who has deserted in a port of the United States, cannot be committed to prison by an alderman, or a justice of the peace for safe keeping, until he find security to proceed on the voyage, notwithstanding he has contracted to submit to certain statutes which, in England authorize such imprisonment. *Commonwealth v. Holloway.* i. 392
7. An action of *assumpsit* on a warranty upon the sale of a horse is within the jurisdiction of a justice of the peace under the act of the 1st of *March, 1745*; and if the plaintiff brings his action in the Common Pleas, and recovers less than 20 pounds, he is not entitled to costs. *BRACKENRIDGE dissented. Sneively v. Weidman.* i. 417
8. Under the act of the 20th of *March, 1810*, no appeal lies from an award of referees in a suit before a Justice, and judgment of the Justice thereon in favour of the defendant. *M'Kim v. Bryson.* ii. 463
9. A person in possession may stay the proceedings of two of the Aldermen to deliver possession to a purchaser at sheriff's sale, on making oath that he claims under the defendant in the execution, by title derived before the judgment, and tendering security. *Lenox M'Call.* ii. 95
10. Such oath is sufficient if it contains a positive averment, that the title is derived from the defendant in the execution, before the judgment, though it does not specify when the title commenced in possession. *Ibid.*
11. It is sufficient if the oath and recognizance are tendered at any time before judgment. *Ibid.*
12. If, on appeal from a Justice, the cause of action be laid in the narr. on a day subsequent to the commencement of the suit before the justice, it is error. *M'Laughlin v. Parker.* iii. 144
13. The assent of the parties necessary to give validity to the assignment of an indenture of apprenticeship, must be certified by the justice, or at least expressed in writing before him, and attached to the instrument at the time of such assignment. Parol proof, afterwards will not suffice. *The Commonwealth v. Jones.* iii. 158
14. A notice to a justice of the peace, under act of the 21st *March, 1772*, was signed by the attorney for the plaintiff and dated at Wilkesbarre, but there was no indorsement of his name, nor was it said that he resided at Wilkesbarre, held, insufficient. *Slocum v. Parkins.* iii. 295
15. Query, If it is essential that the name of the attorney, and his place of abode should be written on the back of the paper containing the notice? *Ibid.*
16. Before the act of the 20th of *March, 1810*, it was not necessary that the cause of action should be entered in the docket of a justice of the peace. If it appeared, that the case was in his jurisdiction, it was enough. *Love v. Barton.* iv. 269
17. The division of a township does not vacate the commissions of the justices of the peace of the district. *The Commonwealth v. The Sheriff, &c. of Northumberland County.* iv. 275
18. The offices of justice of the peace and associate judge of the Court of Common Pleas, are incompatible with each other. *Ibid.*
19. In a suit against a magistrate to recover the penalty of fifty dollars, imposed by the 6th section of the act of the 28th of *March, 1814*, for taking illegal fees, brought before another magistrate, previous notice agreeably to the act of the 21st of *March, 1772*, is necessary. *Prior v. Craig.* v. 44
20. Where a magistrate has general jurisdiction over the subject matter, and intends to act as a magistrate, but mistakes the law, he is entitled to notice previously to the commencement of a suit against him for an illegal act. *Jones v. Hughes.* v. 299
21. Therefore where a magistrate committed a person for travelling on Sunday, though the commitment was unauthorized by law, he was held entitled to previous notice. *Ibid.*
22. If a person acting as a constable is sued jointly with the magistrate, he must be acquitted if he has pursued his warrant. *Ibid.*
23. In an action on the case brought against a magistrate to recover damages for alleged misconduct in his official capacity, a notice of the cause of action signed by the plaintiff, and indorsed "notice to *John Shaw, Esq. Henry Read*, living in Poplar lane between Third and Fourth streets," is defective, in not stating that *Henry Read* was the agent of the plaintiff, and in not containing any thing from which it would be inferred that he was his agent, having authority to

- receive a tender of amends. *Lake v. Shaw.* v. 517
24. *Query*, Whether such notice would be sufficient without stating the city where *Read* resided. *Ibid.*
25. The object of the act of Assembly is to secure to the defendant an opportunity of making satisfaction without being subjected to a suit. The plaintiff may therefore sue out the writ himself and in such case it is only necessary that the place of his abode should be given. *Ibid.*
26. It seems that a justice's transcript is sufficient, if it gives the substance of his proceedings, though inartificial in point of form; and that if the transcript is defective, the Court of Common Pleas may receive an additional return from the justice, or the party may make it up by proof. *Cochran v. Parker.* vi. 549
27. An appellee who would avail himself of a defect in the recognizance on an appeal, must do so at the first opportunity; if he lie by, and suffer an amended return to be received and take no step for more than a year, he cannot afterwards object. *Ibid.*
28. A justice of the peace cannot do an official act or exercise a judicial function out of his proper district or county: Therefore an acknowledgment of a deed by a *feme covert*, taken in Lancaster county, before a justice of the peace of York county, for lands in York county, is void. *Share v. Anderson.* vii. 43
29. But if such *feme covert* afterwards join as executor in a suit to recover the purchase money for the lands conveyed by such deed, the invalidity of the deed is no objection to the plaintiff's recovery; for having affirmed the deed by the suit for the purchase money, she has made her election, and will be for ever barred by the recovery from claiming her dower. *Ibid.*
30. An action will not lie before a justice of the peace, for the balance due on a judgment in the Court of Common Pleas. *Eason v. Smith.* viii. 343
31. When a justice of the peace has jurisdiction of a case, his judgment, though erroneous is binding on the parties until reversed on a *certiorari* or appeal. *Emery v. Nelson.* ix. 12
32. Though on an appeal from a justice, the instrument declared on in the Common Pleas, be stated differently from that mentioned by the justice in some particulars, yet this court will not reverse the judgment, if the cause of action appear in reality to have been the same before both. *Bechtel v. Cobough.* x. 121
33. Account render is not within the jurisdiction of a justice of the peace. If the justice of the peace has no jurisdiction of a case, the Common Pleas have none on appeal. *Guy v. Wright.* x. 227
34. A refusal by a justice of the peace to deliver a copy of his proceedings to either party on demand is indictable under the act of assembly. The sentence of the court in such case, ordering the fine of ten dollars to be paid to the commonwealth, is regular. *Wilson v. The Commonwealth.* x. 373
35. A *devastavit* is not a *trespass*, within the meaning of the act, of the 22d of *March*, 1814, giving jurisdiction to justices of the peace, in cases of trespass for the recovery of damages for an injury done, or committed on real and personal estate. *Wilson v. Long.* xii. 58
36. A justice of the peace has no jurisdiction of an action founded on the judgment of a court of record. *Ibid.*
37. It is not necessary that notice required to be given to a justice of the peace, prior to commencing an action against him for the penalty of fifty pounds, imposed by the act of the 14th of *February*, 1729, for marrying a minor, without the consent of parent or guardian, should state, that there was no publication of banns. A substantial notice of the cause of action is alone required. *Miller v. Smith.* xii. 145
38. An indictment can be supported for a contempt of a justice of the peace, which, though not a breach of the peace, amounts to an obstruction of the execution of his office. *Brooker v. The Commonwealth.* xii. 175
39. A justice of the peace has not jurisdiction in an action of debt against the sheriff, for suffering the escape of a defendant, committed to prison on execution for a sum under one hundred dollars. *Schaffer v. M'Namee.* xiii. 44
40. A justice of the peace has not jurisdiction of debt, for the penalty imposed by the act of the 13th of *April*, 1791, for not entering satisfaction of a judgment. *Zeigler v. Gram.* xiii. 102
41. A magistrate has jurisdiction of

trespass for entering the dwelling of a third person, to search for goods removed by a tenant, where the damages claimed are under one hundred dollars. *Hobbs v. Geiss*.

xiii. 417

42. A notice to a justice of the peace, signed by an agent or attorney need not be served by such agent or attorney personally, but may be served by a person employed by him for the purpose. *Bates v. Shaw*. xiii. 420

43. A justice of the peace is not presumed to be the agent of the plaintiff in a suit brought before him. Therefore a copy of the plaintiff's account, furnished by the justice to the defendant, accompanied by a note demanding payment, is not evidence against the plaintiff, on the trial of another action. *Boyer v. Potts*. xiv. 157

44. Under the "supplement to the act for preventing clandestine marriages," passed the 14th of February, 1729 and 1730, only one penalty of fifty pounds, can be recovered against a justice of the peace for joining two persons in marriage; and, if the parent of one party has already recovered the penalty, no action can be maintained for it by the parent of the other party. *Hill v. Williams*. xiv. 287

45. When a justice has rendered judgment for the plaintiff, under the 14th section of the one hundred dollar act, for a sum exceeding one hundred dollars, the justice has jurisdiction of an action by the plaintiff, against the constable for a false return to an execution issued in such suit, though the amount exceeds one hundred dollars. *Delaney v. Brindle*. xv. 75

KEEPER OF THE PRISON.

The keeper of the prison is bound to receive a person arrested and brought to him by a constable charged with a breach of the peace in his presence. *Commonwealth v. Deacon*. viii. 47

LACHES.

See COUNTERFEIT, 1. GUARDIAN, 1.

LANDLORD AND TENANT.

See DISTRESS, 1, 2, 3, 4, 5. EJECTMENT, 41, 53, 54. EVIDENCE, 81. LEASE. PURCHASE MONEY, 1, 2, 3. REPLEVIN. TESTATOR, 1. VOL. XV.

1. When a landlord's notice to quit, states that the tenant had a lease till the 1st of April, 1811; a purchaser under the landlord, cannot gainsay this assertion; and such tenants may maintain trespass for the way-going crop. *Biggs v. Brown*. ii. 14

2. Though such purchaser obtain possession under a *habere facias possessionem* on a judgment in ejectment, obtained by his landlord against a former tenant; the tenant's right to the way-going crop remains, and the record in the ejectment is not a justification of the trespass. ii. 14

3. The landlord and tenant act applies only to leases on which a certain rent is reserved. *Blashford v. Duncan*. ii. 480

4. Query, Whether justices of the peace, acting under the landlord and tenant act, may make a record of their proceedings without annexing the inquisition? ii. 480

5. But if they do return the inquisition, they cannot contradict it in their record. ii. 480

6. If it do not appear in the proceedings as certified by the record of the justice, that the term is ended, it is an essential defect. ii. 480

7. A tenant who endeavours to deprive his landlord of the benefit of possession, under a fraudulent pretence of giving it up, is still to be considered as a tenant; and cannot defend himself against his landlord, in an ejectment brought to recover possession. *Graham v. Moore*. iv. 467

8. A person who comes into possession under a tenant, is in no better condition than the tenant himself, and cannot defend his possession against the landlord. *Ibid*.

9. In proceedings under the landlord and tenant act, it seems the facts should be found by the inquisition expressly and not by reference to the *venire facias*. *Fahnestock v. Faustenauer*. v. 174

10. But a finding that the facts stated in the *venire facias* are true, is not sufficient where several facts are therein stated; if the jury mean that all the facts are true, they should state so. *Ibid*.

11. The inquisition should expressly find that the term was fully ended. *Ibid*.

12. An inquisition is not good that leaves the necessary facts uncertain and to be made out by conjecture or

- inference. They should be clearly and positively stated. *Ibid.*
13. If a lease is made for a year, and the tenant is afterwards permitted to remain from year to year, a notice in the first month of a new year to quit in three months is illegal. The tenant has a right to hold for that year. *Ibid.*
14. If a tenant agree to purchase land of one who purchased from the landlord, and a conveyance is to be made some months after, up to which time the tenant is to pay the same rent as at present; it is a surrender of the lease, and the purchaser is in possession. *Denison's Executors v. Wertz.* vii. 372
15. To entitle a landlord to recover possession under the landlord and tenant act of the 21st of March, 1772, it is not necessary, where the term is to end on a day certain, that he should have given his tenant notice to quit three months before the expiration of the lease. But where the termination of the lease is uncertain, as where it is from year to year; the landlord, if he wishes to determine the lease, must give notice three months before the expiration of the year. *Logan v. Herron.* viii. 459
16. If the goods of the tenant are removed from the demised premises, in the day time, without the knowledge of the landlord, to secure them from distress for rent becoming due, such removal is not, independently of other circumstances, a clandestine or fraudulent removal, which will authorize the landlord to follow them, within thirty days after they were removed. *Grace v. Shievely et al.* xii. 217
17. The clandestine or fraudulent removal of goods by the tenant, before the rent is due, gives no right to the landlord to follow them after it becomes due, and distrain within thirty days after their removal. *Ibid.*
18. The rule of law, that the tenant cannot contest his landlord's title, is not applicable, where the title of such landlord is a Connecticut title, existing in violation of the laws of Pennsylvania.
- Therefore, such tenant, afterwards purchasing a Pennsylvania title, and continuing to hold under it; may set it up against the original landlord, who claimed under a Connecticut title, though, subsequently to such purchase, the landlord also took out

- another Pennsylvania title. *Satterlee v. Matthewson.* xiii. 133
19. The summons, in a proceeding under the landlord and tenant act, may be made returnable before the fourth day from its date. *Hower v. Krider.* xv. 43

LANDS.

- See ANNUITY, 1. ASSUMPSIT, 5, 6. DONATION LAND. EVIDENCE, 167, 168, 169. IMPROVEMENTS, 9, 10. LIMITATIONS, ACT OF, 15, 16. SURVEY. TAXES. TROVER, 1. UNSEATED LANDS. VENDOR AND VENDEE. WARRANT. WARRANT AND SURVEY.
1. Under the act of the 3d of April, 1804, for selling unseated lands for taxes, the title given by the sheriff is good, after five years have elapsed from the sale without action being brought, whether the proceedings were regular or irregular, and that notwithstanding the sale was for taxes due before the passing of the act, and the purchaser had not entered on the land. *Parish v. Stevens.* iii. 298
2. On a sale of unseated lands for taxes, if no tenant is on the land, the law will presume the purchaser for taxes to be in possession; and if he will not appear and defend his title, judgment will be given against him. *Ibid.*
3. A credit on the books of the receiver general could not be applied on the 31st of December, 1794, to pay for a warrant of that date for unimproved land, founded on an application entered on the 19th of the same month. *Ward v. Armstrong.* iii. 305
4. Where a man sits down on land without warrant or location, and after a small improvement moves off; or barely takes out a location and suffers a considerable time to elapse without doing any thing, he may be presumed to have relinquished the intention of purchasing; but where a man has put his location into the hands of the deputy surveyor, paid the surveying fees, and had the survey returned, a relinquishment of his title will not be presumed without very strong circumstances. *Fisher v. Larick.* iii. 319
5. A. had conveyed lands to his three sons. Afterwards the three sons by writing under seal, bound themselves in the penal sum of the fourth

- part of all the real estates of their father to their sister and her husband, or her issues, when all their father's debts were paid "from all the estates I own, or ever owned, according to their value at this time." *Held*, that the writing did not operate as a conveyance of land, or a burthen on it, but constituted a personal covenant. *Galbraith v. Fenton*. iii. 359
6. *It seems*, if there is a clear intent to make land chargeable with money, ejectment may be supported, when it is the most convenient or only way of compelling payment from the proceeds of the land. *Ibid*.
7. After a possession of land for ninety years, in a thick settled part of the state, building a church on part of the land, and occupying part as a burial ground, a grant of the land, or at least of a pre-emption right from the commonwealth, sufficient to recover in ejectment, will be presumed. *Mather v. The Ministers of Trinity Church*. iii. 559
8. Where two persons are in possession of land, each claiming an exclusive right, the law adjudges the rightful possession to be in the one who has the right to the land. *Ibid*.
9. An application for land vests in the applicant a right, though not a perfect right. It is the inception of a title which may be rendered perfect by future proceedings, or abandoned by the applicant, or lost by negligence. *Philips v. Shaffer*. v. 215
10. Whether such negligence existed is a matter of fact for the jury.
11. If such application does not call for the land with reasonable certainty, the title under it vests only from the return of survey, and a prior return of survey made for another. *bona fide* and without notice, would be preferred. *Ibid*.
12. The same rule applies to the case of a shifted location. *Ibid*.
13. Persons not paying the purchase money under the act of the 9th of April, 1781, are not affected by that act, if the commissioners did not proceed to a sale, by virtue of that law. *Ibid*.
14. The 5th section of the act of the 26th of March, 1785, is confined to claims existing at the passage of that act. *Gilday v. Watson*. v. 267
15. A deed to a person in whose name an application was entered, from the person applying, previous to entering the application, for part of the land is, with the payment of the office fees, *prima facie* evidence that the title was in the person applying. The name subscribed as applicant for land, in 1776, and payment of office fees by him, and his procuring a survey to be made and returned, and other circumstances, may be *prima facie* evidence that the title is his, and the nominee a mere trustee for him: but it may be rebutted by proof to the contrary. *Weidman v. Kohr*. xiii. 17
16. Where both plaintiff and defendant in ejectment claim under a sale of unseated lands for taxes, the plaintiff is entitled to recover, without direct proof of the title being out of the commonwealth. Lands lying in one township will pass under a deed describing them as lying in another, provided there are other circumstances of description sufficient to indentify the land, of which the jury are to judge. The assessor of one township has no right to assess unseated lands, lying in another township for taxes; but if he does so, and the land is sold for non-payment of taxes, the sale is not void, and the purchaser is protected by the act of the 12th of March, 1815. *Stewart v. Shoenfelt*. xiii. 360

LAND OFFICE.

See BOARD OF PROPERTY, 1. RECORDED, 1.

1. The act of the 8th of March, 1815, directed the secretary of the land office "to issue patents to certain original warrantees or their legal representatives." *Held*, that this was a ministerial duty imposed on that officer for the refusal of which a *mandamus* would lie. But the court would not interfere unless it were clearly made out that such officer refused to perform the duty. The act does not authorize the patents to be issued in the name of one of the surviving original warrantees, and a person claiming under articles of agreement and payment of one half the purchase money to the receiver general, where the payment appeared by the receipt to have been made by such person as agent for the original warrantees. *Commonwealth v. Cochran*. i. 473

LAPSED LEGACY.

See LEGACY, 17.

LAW AND FACT.

See JUDGMENT.

LEADING QUESTION.

See EVIDENCE, 273.

A party who joins in a commission, and examines witnesses upon cross-interrogatories, cannot, upon the trial of the cause, object that the interrogatories of the other parties are leading in their character. *Overton v. Tracey*, xiv. 311

LEASE.

See EJECTMENT, 41. JUDGMENT, 12. LANDLORD AND TENANT, 12.

1. If a lease be, "of all that tract of land situate, &c. supposed to contain — acres, more or less, now in the occupancy of A. B.," and A. B. occupy more land than the quantity expressed, lying on both sides of a line, afterwards in dispute with his lessor, it is a lease of all that he is in possession of. *Hall v. Powel*, iv. 456
2. A lease for two years from a future day stating a third person to be in possession, does not imply a promise on the part of the lessor to deliver possession to the lessee. *Cozens v. Stevenson*, y. 421
3. The carrying away by flood of a bridge, no part of the demised premises, whereby their value is diminished, is no reason why the tenant should have a right to an abatement in the rent agreed on.
4. After a lease under seal, the landlord by parol engages to the tenant, who was about moving, (in consequence of a diminution in the value of the property) to reduce the rent, if he staid: this is so uncertain, that equity cannot give relief. *Smith v. Ankrim*, xiii. 39
5. Generally speaking, where a tenant holds over after the first year, the law implies an agreement by him to pay the same rent, and at the same time, which he agreed to the first year.
6. But, if the lease for the first year contain many collateral matters, on each side to be performed, that can only be performed in the first year, it does not follow that the law implies an extension of it to the second year. *Diller v. Roberts*, xiii. 39

LEBANON COUNTY.

See JURISDICTION, 1, 23.

LEGACY.

See ACTION, 7, 8. DEVISE. ESTATE TAIL, 2. EVIDENCE, 192. WILL, 2.

1. A legacy payable in instalments after the legatee's arriving at eighteen; and in case she died before attaining the age of twenty-one years unmarried, or without lawful issue, then or in either case over, is absolutely vested, though the legatee die after twenty-one, without issue. *Scott v. Price*, ii. 59
2. P. D. made the following bequest, "I also give and bequeath unto H. K. my grandson and to his heirs and assigns the sum of one thousand pounds to be paid to him in two hundred pounds, yearly payments, the first payment to be made in *May*, 1808, and from thence two hundred pounds, successively, until the whole shall be fully paid. Nevertheless, if the said H. K. should die, unmarried, and without issue, that then, and in such case, the sum so bequeathed, shall be equally divided to and amongst all my children, share and share alike; but in case he shall marry, and then die without issue from his body, that then and in such case, two-thirds of the said legacy shall only be divided amongst my children as aforesaid, and the one third of the said legacy shall be given to his widow." P. D. the testator, died in the year 1812. H. K. the legatee died in the year 1816, unmarried, and without issue, having about two years previously, attained the age of twenty-one years. *Held*, that the limitation over of the legacy to H. K. being to take effect on the failure of issue at the death of the first taker, was good, and vested the legacy in the children of the testator. *Diehl and another v. King and another, administrators of King*, vi. 29
3. A. bequeathed to her two sons the residue of her personal estate, "and in case either of them should die *without will or lawful issue*, then the property of such son descending from, and given in the lifetime by the testatrix, to descend to the survivor, his heirs and assigns; for ever." One of the legatees having died intestate unmarried, and without issue, leaving, besides the surviving brother already mentioned, a brother and a sister of the half blood, and the issue of two sisters of the half blood who died in his lifetime,

- it was *held*, that the survivor was entitled to the whole of the principal of the personal property bequeathed to his deceased brother, but that the accumulation or savings of the income were to be distributed equally between him and the brother and sisters of the half blood, and their representatives, according to the 7th section of the act of the 4th of April, 1797. *Miffin v. Neal*, administrator of *Miffin*. vi. 460
4. A bequest to a married woman "for her own use," is equivalent to a bequest to her for her *separate use*, and in an action by the husband to the testator, cannot be set off against it. *Jamison and another executors of Jamison v. Brady and wife*. vi. 466
5. In a suit on a penal bill given for a legacy, where a principal point of dispute is, in what kind of money the legacy is payable, a witness may be examined by the legatee as to his knowledge of the value of the testator's estate: but evidence as to the general reputation of its value is not admissible. *McCullough v. Montgomery*. vii. 7
6. Where a penal bill was given, conditionally for the payment of a legacy to the full satisfaction of the testator's widow, the mother of the legatee, it was *held*, that the declarations of the widow on her death bed that she was dissatisfied, and nothing could satisfy her but the payment of the legacy in specie, were not admissible in evidence in a suit on such penal bill: especially if the widow had settled an administration account as executrix of the testator, in which she received a credit for the payment of such legacy. *Ibid.*
7. Where a long period of time has elapsed from the giving of a penal bill for a legacy, the records of suits brought in the interval by the plaintiff against the executor, to recover the same, are evidence in a suit on such penal bill to rebut the presumption of payment arising from the length of time. *Ibid.*
8. No presumption of payment of a penal bill given for a legacy, arises from length of time, where a suit was brought by the legatee in fifteen years after the time when the legacy was payable, which abated by the marriage of the plaintiff, and another suit was brought eight years afterwards, and the plaintiff continued from that time endeavouring to obtain payment of the legacy: and it is immaterial what form of action was used, if the recovery of the legacy was the object of the suit. *Ibid.*
9. Where a legacy was bequeathed by a will dated the 27th of May, 1777, of one hundred and fifty pounds, Pennsylvania currency, payable when the legatee came of age; the testator died in May, 1779, and the legatee came of age in 1783: *Held*, in a suit upon a penal bill given for such legacy, that the case was proper for auditors, under the 4th section of the act of the 3d of April, 1781, and that the court below erred in charging the jury peremptorily, that the plaintiff was entitled to be paid in specie. *Ibid.*
10. The Orphans' Court cannot receive payment of a legacy for the use of a legatee, when there is no suit pending, nor account settled; and therefore such payment by an executor cannot avail him. *Ibid.*
11. A legatee is not concluded by a settlement in the Orphans' Court by an executor, to which the legatee is no party, in which the executor is credited for the payment of the legacy.
12. *Query*: Whether a decree of the Orphans' Court would be conclusive evidence against a legatee of all receipts and disbursements on account of debts, funeral expenses, &c. *Ibid.*
13. *Query*: Whether it would be *prima facie* evidence of the payment of the legacy. *Ibid.*
14. Nor would the judgment of the Supreme Court on an appeal from such decree be more binding than the decree appealed from would have been. *Ibid.*
15. Bequest of personal estate to the testator's wife, "and at her decease, to be divided between her and my poor relations equally." The estate, after the wife's death, is to be divided, share and share alike *per capita*, between the brothers and sisters of the testator, living at his death, and the children of such brothers and sisters as were dead, and the mother of the wife, the father being dead. No other relations of the wife take. *M'Neilledge v. Galbraith*. viii. 43
16. Such a bequest is to be construed, as if the word poor were not in it. *Ibid.*
17. Bequest of five hundred pounds sterling to a niece and her heirs. The legatee dies before the testator,

- leaving a husband and children. The legacy is lapsed. *Dickinson v. Purvis and another, executors of Byron.* viii. 71
18. If a legacy be payable in instalments and the date of the last instalment expires before the testator's death, it is to be considered as a legacy payable generally, and carries interest from one year after the testator's death. *King v. Diehl.* ix. 409
19. Where in this state a legacy is granted to one, and afterwards over on the happening of a contingent event, the executor ought not to pay to the first legatee without security, if required to take security by the legatees over; and on action brought by the first legatee the court would require security before execution issued. *Ibid.*
- But if such payment be made with the consent of all parties concerned, the executors would not be liable to the legatees over. *Ibid.*
20. If a guardian pay to his ward a legacy bequeathed to him, then to others on a contingency, if that contingency happen, the guardian cannot recover it back as a trustee for the legatees over; though the legatees themselves might recover it. *Ibid.*
21. Where a testator orders land to be sold and certain legacies to be paid out of the proceeds, the surplus money after the payment of the legacies does not go to the executors or next of kin, as an undisposed of residue of personal effects, but results to the heir at law. *Wilson v. Hamilton.* ix. 424.
22. Testator ordered the residue of his real and personal estate to be sold, and out of the monies arising therefrom, after the payment of debts and certain legacies, gave legacies to his seven children and grandchildren, and directed should abate proportionably; but if it should be more than sufficient, then the residue should be divided amongst the last mentioned legatees proportionably. One of the last-mentioned legatees died in the lifetime of the testator; held, that this legacy was lapsed. *Craighead v. Given.* x. 351
23. Testator first gives to his wife all his estate, real and personal, during her life; and then says, if she should marry again, she shall continue to enjoy the possession and income of the estate, but neither she nor her husband shall have power to sell or dispose of any part of it, but the whole shall be kept entire until her death, for the uses afterwards mentioned; but if he should die possessed of any property conveyed to him by his wife, as heiress of her father; it was not to be considered as his property, "but remain unto her, and at her sole disposal, at which also should be all his household furniture, family utensils, horses, carriages, plate, plated ware." &c. Then comes the following clause: "And I do further give and bequeath unto her, to be disposed of at her death, one thousand pounds to be raised out of my property in such manner as she shall direct, giving preference to the sale of personal estate." He afterwards gives to his adopted son (on condition of changing his name,) after the death of his wife, "all his estate real and personal, excepting the above sum of one thousand pounds, and what should afterwards be excepted." Held, that one thousand pounds was not an absolute legacy to his wife; and she having died without exercising the power of appointment, it did not pass to her personal representative. *Flintham's Appeal.* xi. 16
24. After ordering all his real estate to be sold by his executors, and the money proceeding from the sale to be put out at interest during the life of his wife, to whom the interest was to be paid, the testator proceeded,— "At the decease of my wife, I do allow the price of my land shall be equally divided among my two sons, A. and B., and my daughters C., D., E., and F., or their heirs, in six equal parts." F. after the death of the testator, married and died without issue, during the life of her mother, who afterwards died. Held, that the legacy was vested in F., and that therefore her husband, as her administrator, was entitled to recover it. *Patterson, surviving Executor, v. Hawthorn, Administrator.* xii. 112
25. Bequest of the residue of the testator's personal estate as follows:—"I give to my son Jacob one half thereof, to be paid to him one year after my decease, and the other half I order my executors to put out on good security, and one half of the interest therefrom, I give to be applied to the support and education of the children of my son Samuel, un-

til they respectively arrive at fourteen years of age; and the interest arising afterwards I give to the said children of my said son *Samuel*, in equal parts and shares as they respectively arrive to lawful age; the other half of the said interest, I give to my said son *Samuel*, to be paid to him annually during his life, and after his decease, I give the principal, so put to interest, to the children of the said *Samuel* in equal parts or shares." *Held*, that the interest becoming due after the children arrived at the age of fourteen years, should be suffered to accumulate, and together with the principal, go to the children on their arrival at the age of twenty-one years. That the bequest to the children of the other moiety given to *Samuel* during life, was not immediate, but that they took it as they took the other moiety; and on arriving at the age of twenty-one, they were to receive the principal, and the interest which had accrued since the death of their father, who died before they were of full age. And, consequently, the guardians of *Samuel's* children, not being entitled to receive either principal or interest, was not responsible for any loss arising from the insolvency of the executor. *Case of Isaac Johnson's Appeal.* xii. 317

26. In a suit for a legacy charged upon land against the executor of the deviser and the terre-tenant, it is improper to join as defendant the executor of the devisee. *Moore v. Rees.* xiii. 436

27. Testator bequeathed as follows:—*Item*, I give and bequeath unto my two youngest sons, each of them, the sum of four hundred pounds, to be paid for their use out of the first money which comes into the hands of my executor, out of my estate. *Item*, I give and bequeath unto each of the children of my daughter B. two hundred and fifty pounds, to be paid to them out of the money which may come into the hands of my executor, after the legacies are paid to my said two youngest sons; but it is my will, and I order, that if any of my sons or grandchildren, to whom I have given the said legacies, should die in their minority, and without issue, then such legacy shall be divided to and amongst my six children, to whom I have given the residue and remainder of my estate." *Held*, that by comparison with other

parts of the will, and under the circumstances of the case, the executor was liable for interest upon the legacies to the testator's grandchildren, from the time he had sufficient funds in his hands to pay them, after payment of the other legacies, which had a priority by the will; and not merely from the time a demand was made, and a refunding bond tendered. *Bitzer's Executor v. Hahn.* xiv. 232

28. Rules with respect to the payment of interest on legacies. *Ibid.*

29. Agreement with the defendant, an executor, by the plaintiff, a legatee, to waive the legacy in consideration of five hundred dollars to be paid to the plaintiff, by promissory notes drawn by the defendants. The notes were drawn, and the plaintiff signed a paper, acknowledging he had received them, to be in full, "when paid" of all demands against the estate of the testator. *Held*, not to be a substitution of the personal responsibility of the defendant for that of the estate. *Durling v. Neigh.* xv. 114

LEGATEE.

See MILL.

LEGAL ESTATE.

See ESTATE, 1.

LEGAL REPRESENTATIVES.

See SPRINGETSBURY, MANOR OF.

LEGISLATURE.

See OFFICES, 1, 4. MILITIA, 1, 2.

LETTERS OF ADMINISTRATION.

See REGISTER'S COURT.

LETTERS TESTAMENTARY.

See EXECUTORS, 3.

LEVARI FACIAS.

See EXECUTION, 11, 12, 16.

At a sale on a *levari*, the mortgagee may purchase, though the property sells for less than the mortgage money and costs. *Blythe v. Richards.* x. 261

LEVY.

See EVIDENCE, 287. SHERIFF.

LIBEL.

See EVIDENCE, 99, 100. INDICTMENT, 39.

LIBERARI FACIAS.

1. Where lands have been extended under a *lib. fa.* and before the expiration of the term, they are sold under a subsequent execution; the first creditor, if he has used reasonable diligence, is to account according to the actual profits, and not according to the valuation of the inquest. *Mall v. Loyd's Executors.* i. 320
2. The sheriff who extends the land, is entitled to poundage on the whole debt; but poundage cannot again be charged on the balance which remains unsatisfied, when the land is sold. i. 320
3. The jury are entitled to no more than the compensation given by law for their attendance, and must pay their own expenses. i. 320
4. The sheriff cannot charge for his attendance. i. 320
5. A mere return to a *liberari* by the sheriff, that he had delivered possession to the plaintiff in that suit, does not vest the title in such plaintiff: it is only an authority to enter; and he must bring an ejectment, or obtain the actual possession, before it can be considered in an ejectment between others, as a subsisting title in him. *Thomas v. Wright.* ix. 87

LICENSES.

1. Under the act of the 2d of *April*, 1821, laying a duty on retailers of foreign merchandize, the treasurer of the city of Philadelphia, is the proper person to grant licenses to, and receive the duties from, all retailers, residing within the bounds of the city. *Commonwealth v. Bacon.* viii. 135
2. If a parol license be given, without consideration, to use the water of a stream for a saw mill, in consequence of which the grantee goes to the expense of erecting a mill, the license cannot be revoked at the pleasure of the grantor; and if he divert the water, to the injury of the grantee, the latter may maintain an action against him. *Rerick v. Kern.* xiv. 267

LIEN.

See EXECUTION, 13. FREIGHT, 3. JUDGMENT, 46. LANDS, 5. MORTGAGE AND MATERIAL MEN. RECOGNIZANCE, 6, 7, 8. SHERIFF'S BOND AND RECOGNIZANCES. 5. TAXES 8, 9. TROVER, 4. 5. WAGES, 1, 2.

1. An unfinished house in the city of *Philadelphia* was sold, and a mortgage given to secure the purchase money, which was immediately recorded. The vendor then went on with the building. *Held*, that the debts of the workmen and persons who furnished the materials for the building, after the recording of the mortgage, should be preferred to the mortgages. *The American Fire Insurance Company v. Pringle.* ii. 138.
2. Lumber furnished for a building, though delivered at the carpenters' shop at a distance from it, and not used, constitutes a lien under the act of 17th *March*, 1806. *Hinchman v. Graham.* ii. 170
3. The act of 1st *April*, 1803, did not give a lien for bricks furnished for buildings by the orders of a person, who was erecting them on an agreement with the defendant, the owner of the ground, though such agreement was unknown to the person furnishing the bricks, and though the defendant was the ostensible owner of the ground and building. *Steinmetz's Executors v. Boudinot.* iii. 541
4. The contract to give a lien under that act must have been with the real owner. *Ibid.*
5. That act did not extend to buildings commenced before its passage. *Ibid.*
6. If an action on the case lay under that act, it ought to be special, and should mention the manner in which the defendant is liable, that the judgment might affect the building and not the person. *Ibid.*
7. A lien for materials furnished to a building, obtained by a claim filed within six months from the furnishing of the same, does not expire at the end of five years from the time of filing the claim. *Knorr v. Elliott.* v. 49
8. If a *supercargo*, who has received no instructions from his shipper to whom to consign the return goods, consign them fraudulently to the owner of the vessel, with a view to secure to him a debt due from the shipper, the owner can derive no benefit from such consignment. *Jacoby and others v. Laussat.* vi. 300
9. The mechanics' lien law of 17th of *March*, 1806, does not authorize a joint claim to be filed for materials furnished for the erection of several houses owned by different persons,

- though the houses join each other. *Gorgas, surviving partner of Warner, v. Douglas.* vi. 512
10. Nor is the case altered by proving on the trial, what materials were furnished for each house. Filing a joint claim is a void act. *Ibid.*
11. Where land is decreed to one heir by order of the Orphans' Court, the purchase money due to the others, is a lien on the land; but a release by the children of one of these heirs who is dead, is binding in equity, and on every one but creditors at law. *Shaw v. Anderson.* vii. 43
12. When an absolute conveyance is made of land, a receipt given for the purchase money, and possession delivered to the vendee, part of the purchase money being paid, and the bond of the vendee and a surety taken for the residue thereof, the vendor has not a lien for such residue of the purchase money against judgment creditors of the vendee, whose judgments are subsequent to the conveyance, though they had notice that the balance of the purchase money remained due. *Kauf-felt v. Bower.* vii. 64
13. A vendor who has given a conveyance and delivered possession, has not a lien for the purchase money due on a bond, against a subsequent judgment creditor. *Semple v. Burd.* vii. 286
14. Taking a bond with warrant of attorney, and entering judgment on it, are not filing a claim or instituting a suit, within the meaning of the Mechanics' Lien Law. *Williams v. Tearney.* viii. 58
15. *It seems*, if a person furnishing materials for a building, do not file his claim within six months after its completion, he cannot recover after two years on a *scire facias*. *Lewis et al. v. Morgan et al.* xi. 234
16. But on the plea of payment to such *scire facias*, advantage cannot be taken of the invalidity of the lien; the plea of payment admits the truth of the averments stated in the *scire facias*. *Ibid.*
17. The effect of the plea of payment in *Pennsylvania*. *Ibid.*
18. *Query*, Whether the recovery of judgment in a personal action before a magistrate, bars the proceeding for the same cause of action by *scire facias*, on a lien filed. *Ibid.*
19. Such judgment is not evidence in the suit by *scire facias*, if it do not appear to have been for the same cause of action. *Ibid.*
20. The declarations of the owner of the building, that he had retained money to discharge the liens, are evidence in a suit against him by *scire facias*, brought by a person who performed labour in the building. *Ibid.*
21. A claim filed under the mechanics' lien law, against the owners or reputed owners of a three storied brick house, situate on the south side of Walnut street, between Eleventh and Twelfth streets, in the city of *Philadelphia*, and against all other person or persons, owners or possessors of said building, is sufficiently certain. *Harker et al. v. Conrad et al.* xii. 301
22. If a lumber merchant, who has separate liens for materials furnished to two houses, receives a payment without actual appropriation by either debtor or creditor, and suffers his lien on one of the houses to expire, he cannot at the trial of a *scire facias* upon a claim filed against the other house, appropriate the payment in discharge of his demand in respect of which his lien had expired, to the injury of a third person, who without notice, had purchased the property against which the lien is sought to be established. *Ibid.*
23. *It seems*, that a lumber merchant has a lien for lumber furnished to make shelves for a vault which formed part of the original plan of the building. *Ibid.*
24. A lumber merchant has a lien for lumber furnished to a building, whether it is used in a usual or necessary manner or not. *Ibid.*
25. A claimant who does not file his claim, or institute a suit within six months after the building is finished, but sues and recovers judgment within two years from the commencement of the building, acquires no lien if the building is not sold by execution within the two years, notwithstanding a sale during that time, by the owner, to another person.
- If a claim is filed after six months from the time the work is finished, no lien exists, though the claimant has taken out a *scire facias*, and recovered judgment within two years from the commencement of the building. *Hern v. Hopkins.* xiii. 269
26. A person, who, on furnishing bricks

for the erection of a building, agrees to be paid part in cash, and "the balance in lumber at fair prices, whenever called for out of S's lumberyard," and accepts the guarantee of S. for the performance of the contract, does not lose his lien upon the building, given by the act of the 17th March, 1806. *Hinchman v. Lybrand.* xiv. 32

27. The interest of a child in the land of his deceased father, continues to be real estate, after an order has been granted to the administrator to make sale of it, and until it is actually sold, and cannot, by any parol agreement, be converted into personal estate, so as to affect the lien of a third person. *Wither's Appeal.* xiv. 185

Therefore, a parol agreement by the son of a decedent, that his brother, who had advanced money for him, and who afterwards, as administrator of the father, obtained an order of the Orphans' Court for the sale of his real estate, should repay himself out of his brother's share of the proceeds of the land, when it should be sold, will not prevail against a judgment obtained after the agreement was made, and before the sale took place, by a third person, who had no knowledge of the agreement.

Ibid.

LIEN OF JUDGMENT.

1. If a judgment be entered under a warrant of attorney, which has been filed in the office of the prothonotary, and which provides for a stay of execution, the five years during which such judgment is a lien on the real estate of the defendant are not to be computed from the time at which execution may issue, but from the first day of the term in which the judgment is entered; unless the *cesset* appears plainly on the record, so as to prevent the possibility of danger to subsequent purchasers and incumbrances. Nor will the court amend a judgment thus defectively entered, by afterwards placing the *cesset executio* on the docket. *Black v. Dobson, Executrix of Dobson.* xi. 94

LIMITATIONS, ACT OF.

- See CONNECTICUT CLAIMS, 2. EASEMENT, 1. EJECTMENT, 9, 10, 42, 43, 44. EVIDENCE, 116, 117, 118. IMPROVEMENT, 9, 10, 11. SCIRE FACIAS, 14, 15, 16.

SHERIFF'S BOND AND RECOGNIZANCE, 5. UNSEATED LANDS, 2.

1. A letter from the defendant to the plaintiff, in which he denies that he was ever liable to the plaintiff's demand, but states, that another person is responsible, by whom, he takes it for granted, payment has been made, and of whom he offers to furnish the plaintiff with evidence to recover, will not avoid the act of limitations. *Brown v. Campbell.* i. 176
2. If an action on the case be brought within six years, and after the expiration of that period the plaintiff be *nonsuited*, the act of limitations is a good plea to another action for the same cause. *Harris v. Dennis.* i. 236
3. Where surveys interfere, the act of limitations has no operation against him who has the best right, unless his opponent takes an adverse and exclusive possession. *Burns v. Swift.* ii. 436
4. The defendant, when the writ was served upon him, said "I will write to Mr. *Watts* to attend to the business; *Moodie* did not do the business accurately: *Held*, that this was such an acknowledgment as took the case out of the statute of limitations.
5. The commonwealth, cannot be affected by the act of limitations. But, *query*, how far it operates as to private persons, where the legal estate remains in the commonwealth, with an equitable interest in those persons. *Ibid.*
6. But unquestionably, the act of limitations runs from the date of a patent, whatever it might do before. *Ibid.*
7. If the defendant acknowledge the principal debt, but disputes the interest, it takes the debt out of the statute of limitations. *Henwood v. Cheeseman.* iii. 500
8. A title by warrant and survey, without patent, is within the act of limitations of the act of the 26th of March, 1785, and is barred by an adverse possession of twenty-one years. *McCoy v. The Trustees of Dickenson College.* iv. 302
9. The general rule is, that after a sale of land, and before a conveyance of the legal title, the vendor is the trustee of the vendee, and the act of limitations will have no operation. But where the vendor disavows the trust, and after having delivered possession to the vendee, makes a lease to a third person, in

- opposition to the title of the vendee, and the lessee enters and holds possession, the jury may presume a disseisin; and if the vendee suffer twenty-one years to elapse without prosecuting his claim, it will be barred by the act of limitations. *Pipher v. Lodge.* iv. 310
10. If the right owner of a tract of land, is in actual possession of a part, he is in constructive and legal possession of the whole, unless he is actually disseised; but if a man enter wrongfully, into the possession of another, his possession does not extend beyond his actual enclosures and improvements, and the statute of limitations will protect no other possession. *Hall v. Powell.* iv. 456
11. The entry of the owner of land is only barred by an actual, continued, visible, notorious, distinct, and hostile possession for twenty-one years. It is not necessary to entitle him to recover in ejectment, that he should prove, that he or those under whom he claims, has been in possession within twenty-one years, before bringing suit. *Hawk v. Senseman.* vi. 21
12. The holder of a descriptive warrant without survey, who has ascertained the limits of his claim by marked boundaries, taken up his residence on the land, cleared a large quantity, and cultivated and improved it, is in possession of the whole tract; and if a third person enters on a part of it, nothing short of twenty-one years' adverse possession will bar the entry of the warrant holder. Such a case is not within the meaning of the 5th section of the act of limitations of the 26th of March, 1785. *Gonzalus and another v. Hoover and another.* vi. 118
13. The defendant's intestate wrote a letter to one of the plaintiff's administrators, stating that he had received a copy of the plaintiff's intestate's account against him, and also that he had made out from his own books his own account against him; but had lost them; requested another copy of the account to be made out and sent to him, and as soon as he received his books, which he expected soon, he would have his own made out again; and concluded by saying, "I will write you again some time hence, and inform you when I will again return to the city, to put a close to this affair in the best manner I can." *Held,* the jury ought to be directed, that it was sufficient to authorize them to presume a new promise within six years, unless they were satisfied that it had no reference to the affairs on which the suit was founded. *Patton's Administrators v. Ash.* vii. 116
14. A person, who, without title or colour of title, enters on unseated land, which has been surveyed and patented to another, acquires a right under the statute of limitations, by twenty-one years' possession, only to as much as he actually cultivates or encloses. *Miller v. Shaw.* vii. 129
15. It is sufficient if the judge charge the jury, that in order to make defence under the statute of limitations, there should have been a possession adverse to the plaintiff for twenty-one years. It is not necessary that he should go farther, and charge that if the defendant entered without colour of title, his adverse possession was not sufficient bar to the plaintiff. *Overfield v. Christie.* vii. 173
16. One who enters on land as a trespasser, clears it, builds a house and lives in it, acquires something which he may transfer by deed or descent, and if the possession of such person, and others claiming under him, added together, amounts to twenty-one years, and was adverse to him who had the legal title, the act of limitations is a bar to a recovery. *Ibid.*
17. If the plaintiff's title first accrued during their infancy, more than twenty-one years before the commencement of a suit, and a suit be not commenced for more than ten years after their attaining full age, they cannot recover against one having adverse possession during that time, notwithstanding, being females, they married during their infancy, and continued *femes covert*, at the commencement of the suit. *Thompson v. Smith.* vii. 209
18. Where a man enters on a tract of appropriated land *without title or colour of title*, the act of limitations will not protect him beyond his actual enclosures. *Farley and another v. Lenox.* viii. 392
19. An action against the sureties in a constable's official bond, is not embraced by the provision in the act of the 28th of March, 1803, which declares that no action shall be sustained, against the sureties of a she-

- riff, after the expiration of five years from the date of the bond. But it is embraced by the act of the 4th of April, 1798, which provides that no suit shall be maintained on any bonds or recognizances which shall be given or entered into by any person or persons, *as sureties for any public officer*, after the expiration of seven years from the time at which the cause of action accrued. *Owings and another v. The Commonwealth.* viii. 530
20. If there be any thing in the plaintiff's case which entitles him to an exemption from the operation of the statute of limitations, he ought, when the act is pleaded, to set it forth in his replication. If he omit to do so, and join issue on the plea, it is incumbent on him to prove an assumption within six years. *Witherup v. Hill.* ix. 11
21. The limitation of six months as to suits against justices of the peace, contained in the 7th section of the act of the 21st of March, 1772, may be taken advantage of by the justice, though not specially pleaded. *Prather v. Connelly.* ix. 14
22. Defendant being arrested on a promissory note, said that he owed the plaintiff the money and intended to have paid him, but that he had taken ungentlemanly steps to get it, and as he had taken these steps, he would keep him out of it as long as he could. *Held*, that this was not such an acknowledgment as would take the case out of the statute of limitations. *Fries v. Boisselet.* ix. 128
23. The residence of a plaintiff within the state of New York at the time when the debt accrued and since, does not bring him within the proviso of the act of limitations in favour of persons beyond sea. *Thurston v. Fisher.* ix. 288
24. A party entitled to the benefit of the proviso, loses his privilege from the time he comes into the state, and a replication to a plea of the act of limitations, not stating that the plaintiff had not been in the state within the time allowed by the act, is bad on demurrer. *Ibid.*
25. Persons having a right of entry into land at the time of passing the act of limitations of the 26th of March, 1785, are not barred by an adverse possession of eighteen years from that time; there must be twenty-one years' adverse possession to bar them of their right, whether their
- right existed before, or arose after that act. *Packer's Lessee v. Gon-salus.* x. 147
26. The 5th section of the limitation act of the 26th of March, 1785, does not apply to persons who were in actual possession of their lands at the time the act was passed. *Mickle v. Lucas.* x. 293
27. An improver who enters upon lands held by another by warrant and survey, is protected, after twenty-one years, by the statute of limitations as to all that he encloses or cultivates without enclosure, but not as to those parts which remain in wood and unenclosed; though he uses them for fuel, fences, &c. This is the general rule, but it seems there may be exceptions, such as the owner's confessing himself out of possession of the wood-land unenclosed; suffering the improver to pay the taxes for it: or perhaps the case of a piece of unenclosed wood-land lying between two neighbouring cultivated parcels, might be left to the jury. There may perhaps be other cases of exception. *Royer v. Ben-low.* x. 303
28. Actual occupation of land for twenty-one years, however tortious or destitute of colour of title, gives a right to the extent of the enclosure, against all the world but the state. The limitation against a settler, runs from the inception of his settlement, whatever may be the date of his warrant. *Munshower v. Patton.* x. 334
29. Though a slight acknowledgment of a debt will take it out of the act of limitations, yet if the debtor qualify his acknowledgment so as to show a determination not to pay, the act will take effect. Therefore, where a debtor, on being called on for payment of a promissory note, more than six years after it became due, said that *as there had been no money transactions between himself and the plaintiff, previous to or during the year 1812, he was surprised at the demand; that he owed him nothing on the account mentioned*, and referred him to his *final discharge* under the act of the 13th of March, 1812, it was *held*, that the debt was barred by the act of limitations, notwithstanding the act of 1812 was unconstitutional and void. *Hudson v. Carey.* xi. 10
30. The operation of the act of limitations was not suspended, while the

- act of the 13th of *March*, 1812, "for the relief of insolvent debtors residing in the city and county of Philadelphia, and their creditors," was held by the courts of this state to be constitutional and valid. *Ibid.*
31. An acknowledgment, to take the case out of the statute of limitations, must be unqualified; if the defendant when he admitted the items of the plaintiff's demand, still claimed a balance due him after settlement of all accounts, that is not sufficient to take the case out of the statute. *Eckert v. Wilson.* xii. 393
32. Twenty-three years after the last payment on account of a bond given by G., as surety for M., (dated about three years before) suit was brought against the executors of G. Whilst the action was pending, and shortly before the trial, the plaintiff's attorney told G's. son, (one of the defendants,) that the estate of M. was not able to pay the debt, and that was the reason they pursued the estate of G's. father: to which he replied, there was property enough of M's., and if judgment went against him, he would be able to show property enough of M's. estate: the court left it to the jury to say whether this was sufficient to rebut the presumption of payment, who found for the defendant: held, this was not error. *It seems* the court might have charged the jury, expressly, that this was not such an acknowledgment as rebutted the presumption. *Boyd v. Geant.* xiii. 124
33. In an action of debt on a foreign judgment stating the foundation of the judgment to be a specialty, the statute of limitations is not a good plea. *Richards v. Bickley.* xiii. 395
34. It is settled law that the acknowledgment of a debt, subsisting at the time of the acknowledgment, is sufficient evidence from which to infer a promise to pay, and to take the case out of the act of limitations; unless it be accompanied by words or explanations inconsistent with such a promise. A letter, therefore, written by defendant, asserting that there was once a debt, that it had been paid, and explaining how it had been paid, will not take the case out of the act of limitations, even if it can be proved that the defendant was mistaken in supposing it had been satisfied in the manner alleged. *Bailey v. Bailey.* xiv. 195
35. The act of limitations does not be-

- gin to run against a parol guarantee of the sufficiency of a mortgage, given to secure a bond payable by instalments, and of the solvency of the mortgagor, until six years after the last instalment has become due. *Overton v. Tracy.* xiv. 311
36. The possession of the *cestui que trust* becomes adverse, and the act of limitations begins to run from the time the legal title is conveyed in violation of the trust. *Scott v. Gallagher.* 333
37. If money be received as a deposit for a special purpose, and the party who receives it, instead of applying it to that purpose, use it, he cannot set up the act of limitations as a bar to a recovery by the party entitled to it. *Johnson v. Humphreys.* xiv. 394
38. If there are several defendants administrators, and all plead the statute of limitations, one, being examined as a witness by the plaintiff, without objection, cannot be asked whether it was intent to plead the act of limitations. *Scull v. Executors of Wallace.* xv. 231

LOCATION.

See LAND, 14. WARRANT AND SURVEY.

LOTTERY.

See FORFEITURE, 1, 2.

A lottery for the disposal of *land*, is within the prohibition of the act of the 17th of *February*, 1762; and no action can be sustained for the price of a ticket. *Seidenbender v. Charles's Administrators.* iv. 151

LOUISIANA.

1. Contract in *Louisiana* according to the laws there between husband and wife enforced here against husband's executors. *Dougherty v. Snyder.* xv. 84
2. What code prevailed in *Louisiana.* *Ibid.*
3. Laws of *Louisiana* proved by the testimony of counsel residing there, learned in the law, no written law on the subject being produced. *Ibid.*
4. Voluntary payment by an executor to legatees, without taking a refunding bond does not excuse him from the charge of *devastavit* at the suit of a creditor. *Ibid.*
5. A wife cannot be a citizen of a state different from that in which her husband's domicile is, so as to sue in the United States Courts. *Ibid.*

6. A feme covert cannot in general sue her husband in *Pennsylvania*, and therefore, she has six years after the discoverture by his death, within which she may sue his executors. *Ibid.*

MAINTENANCE.

After a pardon of the crime of adultery, the court may proceed to make an order for the maintenance of the bastard child, which was the fruit of the adultery. *Duncan v. The Commonwealth.* iv. 449.

MALICIOUS PROSECUTION.

In case for a malicious prosecution, a declaration, stating that the defendant maliciously, &c. caused the plaintiff to be indicted, is good, though it appear by the *narr.* that the plaintiff was tried and acquitted, and there is no averment that the defendant maliciously caused the plaintiff to be tried. *Graham v. Noble.* xiii. 233

MANDAMUS.

See ATTORNEY, 2, 3. CORPORATION, 16. COUNTY COMMISSIONERS, 5, 8. LAND OFFICE, 1.

1. The return to a *mandamus* to restore one who had been expelled from a religious society was held to be insufficient, because it stated that he was tried and expelled by a "select number" of the society, without showing the authority of that "select number." *Green v. African Society.* i. 254.

2. Where the rules of such a society forbade members commencing law suits "except the case (were) of such a nature as to require and justify a process at law," it was held not sufficient in the return to a *mandamus*, to state the rule and aver that the expelled member had commenced a suit at law. It should also have been averred that the case (was not) of such a nature, &c.

i. 254

3. It seems that if the return to a *mandamus* state, in general terms, that the member of a corporation was expelled for a violation of duty, without specifying the charges on which he was convicted, it is bad. *The Commonwealth v. The Guardians of the Poor of the city of Philadelphia, &c.* vi. 469

4. Under the 45th section of the act of the 26th of March, 1821, the court will not grant a *mandamus* to a Turnpike Company, to grant a certificate to a person claiming on a judgment against them, if they return that such judgment was not obtained for work, labour, or service, performed within the intent of the said act. *Commonwealth v. The President, &c. of the Anderson's Ferry, &c. Turnpike Road.* vii. 6

5. It is not, however, a sufficient return, that a judgment obtained against them is appealed from; such case is provided for by the act, and a *mandamus* will lie to compel them to grant a certificate. *Ibid.*

6. Query, Whether this Court has power to issue a *mandamus* to the Court of Common Pleas? *Morris v. Buckley and others.* viii. 211

7. The practice has been not to issue writs of *mandamus* except from the court which sits in the district in which the persons reside to whom the *mandamus* is to be directed. *Commonwealth v. Clarke.* ix. 59

MANSLAUGHTER.

See PENAL LAWS.

1. On an indictment for murder, a verdict of not guilty of murder, but guilty of manslaughter, is good, and is to be considered as a conviction of voluntary manslaughter. *Commonwealth v. Gable.* vii. 423

2. One who is indicted of murder, cannot be convicted of involuntary manslaughter. *Ibid.*

3. If on such indictment, the offence appear to be voluntary manslaughter, the defendant should be acquitted; yet he may be indicted for a misdemeanor. *Ibid.*

MARINER.

1. An assault by a mariner on the captain of a vessel, is such gross misbehaviour as will produce a forfeiture of wages, and justify the captain in discharging him, unless followed by humble submission, and such behaviour as affords a strong probability of future good conduct. *Buck et al. v. Lane.* xii. 266

2. What would be the effect of such submission on the captain's right to discharge the mariner, query? *Ibid.*

MARKET OVERT.

See SALE.

The doctrine of sale in markets overt

does not extend to *Pennsylvania*.
Easton v. Worthington. v. 130

MARRIAGE.

See EVIDENCE, 58, 187. JUSTICE
OF THE PEACE, 44.

MARRIAGE SETTLEMENT.

Construction of a settlement obscurely
worded. *Bosler v. Bosler*. x. 300

MASTER.

See FREIGHT, 1, 2, 3.

MAURICE RIVER COVE.

See NEW JERSEY.

MAYOR.

See CONSTITUTION, 6.

MEADVILLE SEMINARY.

See EVIDENCE, 341, 342, 343, 344,
345.

In a suit for the subscription to the
Meadville seminary, under the 4th
section of the act of the 12th of
March, 1800, the subscription book,
signed by the defendant, is evidence,
without showing that security was
given for the amount subscribed.

It seems, it is not necessary to a reco-
very of such amount, to show that
such security was given.

By the act of the 4th of *April*, 1805,
certain trustees of the *Meadville* se-
minary thereby appointed, were au-
thorized to sue, and an action was
brought accordingly. By subse-
quent acts, their right of action was
abolished, but no application was
made to abate the suit. In *Janua-*
ry, 1812, another act was passed,
under which it was held, the right
of suing was revived, and the for-
mer action was maintainable. *Da-*
vis v. Meade. xiii. 281

MECHANICS AND MATE- RIAL MEN.

See LIEN.

MERCER, BOROUGH OF.

See QUARTER SESSIONS, COURT
OF, 1.

MERGER OF SIMPLE CON- TRACT DEBTS.

1. If a third person confess a judg-
ment to the plaintiff, for a simple

contract debt due from the defend-
ants to the plaintiff; the simple con-
tract debt is not merged in the judg-
ment. *Wolf v. Wyeth*. xi. 149

2. Nor is the judgment a payment or
extinguishment of the simple con-
tract debt, unless such be the agree-
ment of the parties. *Ibid*.

MESNE PROFITS.

See EJECTMENT, 58.

METES AND BOUNDS.

A. having a sheriff's deed for a tract
of land, described by certain bound-
aries, and said to contain three hun-
dred acres, conveyed it to B. by the
same boundaries; but calling it two
hundred acres. He afterwards con-
veyed to C. an adjoining tract, and the
sheriff's deed for the first mentioned
tract, deducting the 200 acres sold
to B. It was afterwards agreed be-
tween B., C., and D., (to whom B.
had conveyed) that the two hundred
acres should be laid off at the south,
instead of the north end of the tract,
so as to include certain improve-
ments; and for the privilege of doing
this, B. agreed to transfer to C. one
of D's. bonds to him for fifty pounds.
Held, that the whole tract, and not
merely two hundred acres, having
been conveyed by A. to B., C. could
derive no title to the land thrown
out at the north end of the tract,
either under A's. deed to him or un-
der the agreement. *Smith v. Ol-*
iver. xi. 257

MILITIA.

1. The legislature had a right to pass
a law for trial, by courts martial, of
drafted militia who should refuse or
neglect to march to the place of ren-
dezvous, agreeably to the orders of
the governor, founded on requisitions
of the president of the United States.
Moore v. Houston. iii. 169
 2. Such court martial cannot be orga-
nized by the sole authority of the
governor, by virtue of the act of
congress of the 28th of *February*,
1795, without an act of assembly to
authorize it. *Ibid*.—And *Bolton's*
case. iii. 176
 3. The deputy marshal is justified in
executing the process of such court
martial, authorized by an act of as-
sembly.
- Query*, Whether he could be com-
pelled to execute it? *Moore v. Hous-*
ton. iii. 169

4. Where fines are inflicted for breach of militia duty, the delinquent has not a right to trial by jury. *Ibid.*
5. A class list, and inspection roll, signed and affirmed to by a captain, and returned by him is good evidence, when he has left his abode, and cannot be found after diligent search. *Ibid.*
6. The 25th section of the 28th of *March*, 1814, appears to be confined to preventing writs of *certiorari*, and removal of the proceedings of courts martial, but does not operate to prevent an inquiry into the jurisdiction of such courts. *Ibid.*
7. A court martial cannot be held under the sole authority of the governor, for the trial of militia, who neglect or refuse to attend at the place of rendezvous, in conformity to the orders of the governor, founded on the requisitions of the president of the United States. *Duffield v. Smith*, iii. 590
8. The third section of the act of the 19th of *March*, 1816, does not extend to suits brought before the passing of that act. *Ibid.*
9. *Query*, If the provision in that section, relative to actions of trespass, is not subject to the proviso, that they are constituted under the authority of the United States, or of this state? *Ibid.*
10. Though a party has appeared before a court martial and confessed his guilt, he is not thereby estopped from contesting its jurisdiction. *Ibid.*
11. In order to be entitled to be placed on the exempt list, under the 2d section of the act of the 19th of *March*, 1816, it is not necessary that any positive, affirmative act, should be done, expressive of a desire not to be enrolled: every person who does not expressly declare whether or not he wishes to be enrolled, is to be considered as an exempt. *The Commonwealth v. Cornman*. iv. 83
12. The proceedings of the court of appeals, on matters submitted to them according to law, cannot be questioned in this court on a *habeas corpus*. *Ibid.*
13. The jurisdiction of the court of appeal, extends to cases of exempts, who are entitled to be heard before that court. *Ibid.*
14. If a person who is entitled to be placed on the list of exempts, be returned as an enrolled militia man, with a fine imposed on him for non-attendance at parade; and he do not appear before the court of appeal to claim his privilege, in consequence of which, he is returned by the president of the court to the brigade inspector, in the list of persons whose fines have not been remitted; his case is to be considered as having been before the court, and a judgment pronounced upon it; and it being matter within their jurisdiction, their sentence is conclusive. *Ibid.*
15. A warrant directed by the brigade inspector to a constable, commanding him to levy the fine for non-attendance at parade, on the goods and chattels of the delinquent, and for want of such goods and chattels, to take his body and convey him to prison, *there to be kept, until the fine and costs are paid*, is bad; the 23d section of the act of the 28th of *March*, 1814, only authorizing in such cases, an imprisonment for *not less than one, or more than two months*, at the discretion of the field officers of the regiment, to which the delinquent belongs. *Ibid.*
16. *It seems*, that if the field officers of the regiment, before any warrants are issued, were to determine the period of imprisonment in the case of each delinquent, a warrant commanding a constable to levy on property if to be found, but, if not, to imprison the delinquent for the time directed by the field officers, with a recital that the said officers had, in pursuance of the act of assembly, directed the imprisonment for *not less than one, or more than two months*, at the discretion of the field officers of the regiment, to which the delinquent belongs. *Ibid.*
17. *It seems*, that if the field officers of the regiment, before any warrants are issued, were to determine the period of imprisonment in the case of each delinquent, a warrant commanding a constable to levy on property if to be found; but, if not, to imprison the delinquent for the time directed by the field officers, with a recital that the said officers had, in pursuance of the act of assembly, directed the imprisonment to be for such a time, would be good. *Ibid.*

MILLS.

Query, As to the principles that ought to regulate the rights of mills in respect to their streams of water. *Strickler v. Todd*. x. 68

MISDEMEANOUR.*See* INDICTMENT, 42, 43.**MISNOMER.***See* EJECTMENT, 12.**MISTAKE.***See* RELEASE, 8.**MONEY.***See* EXECUTORY DEVISE. LEGACY, 18, 19, 20.**MONEY HAD AND RECEIVED.***See* ACTION, 31, 32. ADMINISTRATOR, 6.

1. A purchaser of real estate, cannot recover back the purchase money, in an action for money had and received, in case the title proves defective, unless there be fraud or warranty. *Dorsey v. Jackman.* i. 42
2. Between the sale of goods and of land, there is a marked distinction. In the former, the law implies a warranty of title, but not in the latter. i. 42
3. *Query*, Whether the purchaser of land can have relief, in case the defect of title is discovered before the payment of the purchase money. i. 42
4. Where it is a question, whether a sum of money in the hands of the defendant, belonging to A., has been appropriated by A. to the plaintiff, or to B., evidence, that B. told the defendant that he claimed the money for his clients and should look to him for it, is admissible on a count for money had and received. *Wolf v. Wyeth.* iii. 149

MONTH.*By* the word *month*, in an act of assembly, a calendar month is intended. *Moore v. Houston.* iii. 169**MORE OR LESS.***See* OVERPLUS.**MORTGAGE.**

See DAMAGES, 3, 4. EJECTMENT, 66, 67, 68, 69, 71. EVIDENCE, 174. EXECUTION, 19, 20, 25, 26, 27, 28. FRAUD, 2. JUDGMENT, 13, 37, 38. LEVARI FACIAS. LIEN, 1, 2. NOTICE, 4, 5. PAYMENT WITH LEAVE, 3. PROCESS, 1, 2. PROMISSORY NOTE, 12. RELEASE, 4, 5. SCIRE FACIAS, 1, 10, 13. SHE-VOL. XV. 3 F

RIFF'S SALE, 19. USURIOUS CONTRACT, 1. WAGES, 2.

1. In a *scire facias* suit upon a mortgage, the mortgagor may give in evidence, that part of the mortgaged premises had been evicted by a title paramount to that of the plaintiff. *Steinhauer v. Witman.* i. 438
2. A. on the 19th September, 1815, to secure two creditors, executed to them a mortgage of the bark and tools in his tan yard, and of his skins and leather unfinished in bark and vats for tanning, and provided that the mortgagor should continue in possession for the purpose of working, tanning and finishing the same. The mortgage was not recorded, and the property remained in the possession of A. who was a tanner, and he continued to work the leather in tanning and to use for that purpose the tools and bark. No symbolical delivery took place, nor was there any schedule, inventory, or appraisal of the property mortgaged: *held* that the mortgagor's continuing in possession, under the circumstances of the transaction, was fraudulent *per se*, and void against a *bona fide* creditor who without notice levied an execution in the spring of 1816, *Clow v. Woods.* v. 275
3. Mortgagor and mortgagee enter into articles of agreement for the sale of the mortgaged premises and the mortgagee goes into possession, but before the execution of a deed, the mortgagor leaves the country; if the mortgagee afterwards issue a *scire facias* on the mortgage, it is no relinquishment of his title under the articles, though accompanied by declarations to third persons (which did not appear to have come to the knowledge of one who has subsequently purchased of the mortgagor,) that he held under the mortgage. *Plumer v. Robertson and another.* vi. 179
4. A mortgage not duly recorded, is not a lien on land against a subsequent judgment creditor. *Semple v. Burd.* vii. 286
5. If a bond and warrant of attorney are given, accompanying a mortgage, a sale of land under a *fieri facias* and *venditioni* issued on the judgment entered up under the warrant, avoids a lease made by the mortgagor after the mortgage but before the entry of the judgment on the warrant. *McCall v. Lenox.* ix. 302

6. A deed accompanied with a written agreement between the parties of the same date, reciting that the deed was made for a certain sum due from the grantor to the grantee, or for securing the payment thereof, and stipulating that the grantee will not sell or mortgage the property for three years and three months, and will then deliver up the deed to the grantor, if the money is paid by instalments within that time, and providing that if either party die, or the premises must be sold within that time, and more than the sum due, and interest are obtained the surplus shall go to the grantor, but if less the grantor shall supply the deficiency, is a mortgage. *Stoe-ver v. Stoe-ver.* ix. 434
 7. If however, the money is equal to the value of the premises, and the time fixed elapses without payment, and the grantee brings ejectment, on which a judgment is entered by agreement stipulating, that in case of repayment by a certain day, the property shall remain in the defendant, otherwise a writ of *habere facias possessionem* to issue, and the rents of the interval to be paid to plaintiff, and default of payment being made, a writ issue, on which possession is delivered to the grantee, who retains it and makes improvements, the grantor acquiescing by silence, and becoming insolvent, and making no return of the premises as his property, the grantee is entitled to the premises. *Stoe-ver v. Stoe-ver.* ix. 434
 8. But parol evidence is admissible on behalf of the plaintiff suing for the use of his creditors, to show a prolongation of the time of redemption, and to rebut the presumption of acquiescence, by the declaration of the grantee, that he intended after a sale, to pay the surplus to the creditors or children of the grantor. *Ibid.*
 9. On a mortgage of the land with authority to the mortgagee to sell after a certain time, and to pay the surplus, if any, after satisfying the debt to the mortgagor, if there is no covenant or special agreement to pay, *indebitatus assumpsit* lies for money had and received for a surplus arising from the sale. *Ibid.*
 10. If the question, whether mortgage or not depends solely on writings, parol evidence is inadmissible; but if it be admitted, and the question depends partly on that evidence, it should be left to the jury, whether it was a mortgage or not. *Ibid.*
 11. On the 1st of May, 1807, A. executed a mortgage to B. which was duly recorded. On the 14th of March, 1815, C. entered judgment against A. for 2000 dollars, by virtue of a warrant of attorney for that purpose. There was some evidence of a parol agreement that C. was not to enter up judgment until a certain time, which had not expired when the judgment was entered, and within which conveyance hereinafter mentioned was made. On the 17th March, 1815, A. conveyed the mortgaged premises to D. for the consideration of 2800 dollars, 2300 of which he paid, and agreed to pay B. the mortgagee 500 dollars, the balance then due on the mortgage, and to lift the mortgage. D. in his lifetime paid part of the balance, and the residue was paid after his death, by his executors, to whom an assignment of the mortgage was executed on the 23d of September, 1818. The premises were levied on and condemned under a *fi. fa.* returnable to August Term, 1818, issued by C. the judgment creditor, and afterward sold by the sheriff to C. Held, that D. was not entitled to receive out of the purchase money, the balance due upon the mortgage, at the time of the conveyance to him, but that C. was entitled to retain it. *Anderson et al. Executors of Porter, v. Neff.* xi. 208
 12. In ejectment by a mortgagee against a judgment creditor of the mortgagor, who bought the land under a sale on his judgment, evidence is admissible that the defendant was present at the sale, knew of plaintiff's mortgage (which was given before the judgment though not recorded till after,) and that the sheriff expressly sold the land subject to the mortgage. *Muse v. Let-terman.* xiii. 167
 13. A debtor may prefer a creditor, by giving him a mortgage: and the ante-dating such mortgage cannot affect the creditor who was not privy to it.
- Though a mortgagee give notice of his mortgage, by advertisement, at the time of a sheriff's sale of the land, under the judgments of other creditors, this does not estop him from claiming the proceeds of such sale. *Little v. Neville.* xiii. 227

14. In a *scire facias* on a mortgage, the mortgagor may give in evidence the admissions of the mortgagee, after the mortgage was given, that it was for more money than the mortgagor had received, part only of the sum mentioned being paid. *Mackey v. Brownfield.* xiii. 239

15. The objection that a bond and warrant were usurious, cannot be taken to a *scire facias* on the judgment confessed on the warrant. *Lysle v. Williams.* xv. 135

16. Under an agreement between mortgagor and mortgagee, that the latter shall go into possession and receive the rents, and apply them to the payment of the debt, he is entitled to an allowance for payment of taxes, ground rent, and necessary repairs. *Ibid.*

MORTGAGEE.

See MORTGAGE. NOTICE, 4.

MOURNING.

See EXECUTORS AND ADMINISTRATORS, 23.

MOYAMENSING.

See ROADS, 9. WITNESS, 70.

NAVIGABLE STREAMS.

1. An act permitting the owners of lands, adjoining any navigable stream of water, declared by law a public highway, to erect dams, and prescribing a special proceeding, for injury to the navigation, comprehends a stream declared a public highway, after the passage of the act; especially if the summary remedy given to persons who sustain damage, is extended by the act to streams thereafter declared public highways. *Brown v. The Commonwealth.* iii. 273

NEGROES AND MULATTOES.

See SERVANT. SLAVE.

1. If it does not appear on the face of the registry of a negro child, under the act of 29th March, 1783, whether or not it was made within six months from the birth of the child, the registry is not good. *Query, Whether such defect may be supplied by a parol proof? Commonwealth v. Craig.* i. 23

2. Where a negro claims freedom under his mother, who was manumitted by will, it is not evidence against him, that the petition of his

grandmother, who claimed to have been manumitted by the same will, had been dismissed by the general court of Maryland. *Wood v. Negro Stephen.* i. 175

3. In the registry of a slave, under the act of 1st of March, 1780, it is not necessary, that it should have been set forth, whether the person registered, were a slave for life, or servant, till thirty-one years of age. *Wilson v. Belinda.* iii. 396

4. But it is necessary, that the sex should be expressly stated, and though the name be such as might imply the sex, it does not cure this defect. *Ibid.*

5. It is not necessary for the person registering a slave, to set forth the town or county in which he resides; it is sufficient, if the slave be registered in the county where the owner resides. *Ibid.*

6. If the registry does not state the occupation of the owner of a slave, parol evidence may be given to show he had none. *Ibid.*

7. A negro or mulatto servant, who binds himself in another state to serve his master until the age of twenty-eight years, in consideration of manumission, and is brought into Pennsylvania to reside, cannot be removed out of the state without his consent, although the indenture contain a covenant to serve his master in Pennsylvania, or any other state; such a covenant is void; nor can his master imprison him, in order to compel his consent. *The Commonwealth v. Greason.* iv. 425

8. A return of a mulatto child under the 4th section of the act of the 29th of March, 1783, as "born about the 15th of November, 1780," is a good return, where it sufficiently appears that the entry and oath of the registry were made by the owner of the mother.

Though the sex of the child and occupation of the owner were omitted in the return, yet if they are stated in the registry by the clerk, the defect is cured. *Stiles v. Nelly.* x. 366

9. Where the registry of a negro child under the act of the 29th of March, 1783, does not state the occupation of the master, parol proof may be given, that he had no occupation at the time of registry. But, if the evidence leave that fact in doubt, the registry is not good. *The Commonwealth v. Barker.*

NEUTRAL.

See INSURANCE, 13.

NEW JERSEY.

It seems, that the cove opposite the mouth of Maurice's river, is within the jurisdiction of the state of New Jersey, and forms part of the county of Cumberland. Kean v. Rice.

xii. 203

NEW TRIAL.

See DAMAGES, 2.

1. If a court, before which a *habeas corpus* is depending, direct an issue for the trial of facts, it retains a superintending authority over the verdict, and may order a new trial. *Graham v. Graham.* i. 330
2. Unless the judge who tries the cause is dissatisfied with the verdict, it must be a very clear case that would induce the court to order a new trial upon matters of fact. *Ludlow v. The Union Insurance Company.* ii. 119
3. A motion for a new trial, is an appeal to the discretion of the court. Unless injustice be done, a new trial should not be granted. *The Commonwealth v. Eberle.* iii. 9
4. The court will not grant a new trial on a point not made at the trial; unless the party moving for a new trial, would be without remedy, if the verdict should stand. *Peters v. The Phoenix Insurance Company.* iii. 25
5. The court will not grant a new trial, on the ground of a claim, which the party might have brought forward at the trial, but did not. *McDermott v. The United States Insurance Company.* iii. 604
6. The court possesses the power of setting aside verdicts, where disproportionate and enormous damages have been given; but it must be a rank case, to exercise that power. Therefore in an action for the malicious abuse of process, the court refused to award a new trial where all the facts and circumstances were fairly submitted to the jury, although they considered the damages unnecessarily high. *Sommer v. Wilt.* iv. 19
7. It is incumbent on a party who moves for a new trial on the ground of newly discovered evidence, to satisfy the court, 1st, that it came to his knowledge since the trial; 2d, that it was not owing to want of due

diligence that it did not come sooner; 3d, that if a new trial were granted, a different verdict would probably take place. *Moore v. The Philadelphia Bank.* v. 41

8. The judge before whom the cause was tried at *Nisi Prius*, having declared that, in his opinion, the verdict was greatly against the evidence and the justice of the case, the court granted a new trial. *Pringle v. Gaw.* vi. 298
 9. The jury having presumed the existence of a record on very slight grounds, and contrary to the opinion of the judge who tried the cause, the court set aside their verdict. *Willing and others v. Brown.* vii. 457
 10. A new trial will be granted, if the verdict is for the plaintiff, and it appears by the *affidavit* of one of the jurors, that after the jury had received the charge of the court, and retired to consider of their verdict, the foreman of the jury declared that the plaintiff had satisfied him with regard to a difficulty in the plaintiff's account, in a conversation he had with him out of court, after the jury had been sworn. *Ruthe v. Holbrook.* vii. 458
 11. New trial granted for excessive damages in an action of trespass against the sheriff. *Kuhn v. North.* x. 399
- NON EST FACTUM.
See PLEADING, 20, 37.
- NON EST INVENTUS.
See PLEADING, 7, 8, 9. SHERIFF, 22.
- NON PROS.
See EJECTMENT, 26.
1. The operation of the rule of this court, of *September* the 15th, 1801, directing the prothonotary to enter a *non pros*, as a matter of course, unless a declaration be filed within twelve months from the first day of the term to which the original process is returnable, is suspended while a cause is before arbitrators under the act of the 20th of *March*, 1810: and upon an appeal the rule does not run from the first day of the term, without deducting the period during which the cause was out of court. *McCall v. Crousillat.* ii. 167
 2. *Query*, Whether the twelve months should not be computed from the time of entering the appeal? ii. 167

NONSUIT.

1. A judge of *Nisi Prius* is not authorized to order a nonsuit for the non-production of papers, under the act of the 27th of February, 1798. The order must be made by the court in bank. *McDermott v. United States Insurance Company.*

i. 357

2. The court cannot compel a plaintiff, who has given evidence in support of his case, to suffer a nonsuit. *Irving v. Taggart.*

i. 360

3. The court cannot, after reserving a point and verdict for the plaintiff, order a nonsuit. *Jones v. Hughes.*

v. 299

NOTARY PUBLIC.

See EVIDENCE, 151, 254, 269.

1. The certificate of a notary public, under his notarial seal, is *prima facie* evidence, that the person who uses it and signs the certificate is a notary, commissioned by the governor. *Brown v. Philadelphia Bank.*

vi. 484

2. A notarial protest is evidence of notice to the indorser of a promissory note of non-payment by the drawer. *Ibid.*

3. A notary public may be compelled to testify against the truth of his certificate of protest. *Parry and Co. v. Almond.*

xii. 284

NOTICE.

See ARBITRATION, 29, 38. AS-

SIGNMENT, 2. ASSUMPSIT, 31.

BILL OF EXCHANGE, 2. BOOKS

AND WRITINGS, 5. EQUITY, 1.

EVIDENCE, 46, 92, 226, 360. DE-

POSITION, 9, 10, 11, 14, 16, 17.

INSOLVENT LAWS, 2. JUSTICE,

20, 37, 42. PAROL EVIDENCE,

10. PRACTICE, 19. PROMIS-

SORY NOTE, 2, 3, 9, 13, 17.

SHERIFF, 9. SHERIFF'S SALE,

7. TRUST, 3.

1. Query, Whether in general possession is notice of a claim. *Covett v. Irwin.*

iii. 283

2. But if there is a sale of land by the sheriff, as the property of A.; and B., who is in possession, stands by, knowing that he is represented, as the tenant of A., and does not contradict it, he cannot afterwards contest the title of A. with the purchaser. *Ibid.*

3. Constructive notice is matter of law for the decision of the court,

but if the court leave it to the jury to decide, whether the defendant had received notice actual or constructive, and at the same time inform them that notorious possession is constructive notice, it is not error. *Gonzalus and another v. Hoover and another.*

vi. 118

4. If a mortgagee, whose mortgage is recorded, enter into articles of agreement for the purchase of the mortgaged estate and go into possession without recording the articles, such possession is not notice to a purchaser, of the mortgagee's title under the articles; even where there is a rumour of his purchase in the neighbourhood. If it be left as a circumstance to the jury they should be told, that it is not, *ipso facto*, legal presumption of notice. *Plumer v. Robertson and another.*

vi. 179

5. Where the defendant is merely a stake-holder, and the suit is instituted by agreement, to try the right of the plaintiff or a third person, to money in the defendant's hands, notice of taking a deposition on behalf of the plaintiff, should be given to such third person; a notice to the defendant is not sufficient. *Nicholson v. Eichelberger.*

vi. 546

6. If a rule of reference does not state the time and place of meeting, or the notice to be given, the court will set aside the report, if reasonable notice be not given, or if it be shown that no notice was given of a particular meeting; but these exceptions, being founded in fact, are not proper for the decision of a court of error. *Herman v. Freeman.*

viii. 9

7. Where a suit has been marked to the use of another, notice to the plaintiff on the record, of the time and place of taking a deposition, is sufficient, where he has always appeared in the suit, either as party or agent. *Richter v. Selin.*

viii. 425

8. Where the executors were defendants, who had been notified on a former trial between the parties, to produce a paper, and on the present trial, one of them had been notified, who swore that he had made inquiry of the other members of the family, and diligent search had been made and the paper could not be found, and the deed of the testator, under which the plaintiff claimed, referred to the paper, the notice was held sufficient. *Patton v. Goldsborough.*

ix. 47

9. Possession of land is always con-

structive notice of the actual title of the person in possession. *Harris v. Bell.* x. 39

10. In a feigned issue to try the validity of a judgment assigned to the plaintiff, entered by warrant of attorney upon a bond, it is not error to charge the jury, that if the person, who at the time was the proprietor of the bond, after having entered judgment upon it, had agreed not to enter judgment, and declared to the obligor that no judgment had been entered, the effect of such agreement and declaration would be, to render the judgment null and void, and that it would be a fraud to proceed on the judgment under such circumstances; provided the assignee had notice of such agreement before the assignment. *Kellogg v. Krauser.* xiv. 137
11. But it is not necessary, in order to be affected by the agreement, that the assignee should have notice on record, or even in writing. *Ibid.*
12. Notice in any way is sufficient, provided it be full, and such as could leave the party in no reasonable doubt. *Ibid.*
13. If the warrantor on notice by the vendee to come in and defend the title, neglects to do so, the verdict is conclusive against him. If the vendee does not give notice, but defends, he cannot recover his counsel fees, and his own expenses, unless in case of absence of the warrantor, or fraud. *Fulweiler v. Baugher.* xv. 45

NOTICE OF SPECIAL MATTER.

See EVIDENCE, 352, 353.

NOTICE TO QUIT.

See EJECTMENT, 18, 19; 54. LANDLORD AND TENANT, 12.

NUISANCE.

See AUCTIONEER, 1, 2. INDICTMENT, 47.

The obstruction of a highway is indictable at common law, and not under the act of assembly of the 6th of April, 1802; which inflicts an additional punishment for a distinct offence, viz: for not removing the nuisance on notice from the supervisors of the township. In a prosecution, therefore, for running a fence across a public road, it is not necessary to prove that notice to remove it, and repair the damage, was given

by the supervisors to the defendant. *Kelley v. The Commonwealth.* x. 345

NUL TIEL RECORD.

See ERROR, 26. PLEADING, 59.

OATH OF OFFICE.

See TAXES, 11.

OBLIGATION.

See BOND, 4, 5. JUDGMENT, 50. SHERIFF'S BOND.

1. The receipt of the obligee, in a single bill, given to the obligor, after an equitable assignment by the obligee, who had not the bill in his possession, is not evidence, in a suit on the bill, in the name of the obligee, for the use of the assignee. *Morton v. Morton.* xiii. 107
 2. The bond to be given by the insolvent, under the 1st section of the act of the 28th of March, 1820, is to be for the benefit only of the arresting creditor: if taken for the use of other creditors, it is void. *Cochran Macknight.* xiii. 190
 3. An indorsement in blank by the payee of a sealed bill does not make him liable to the holder. *Folwell v. Beaver.* xiii. 311
- Nor is such indorser liable on the ground of an express promise to pay by his offer of a compromise, or silence when demand is made, or any thing short of a clear and unequivocal promise. *Ibid.*

OFFICER.

See BANK, 4, 5. FEES, 12. PUBLIC OFFICER, 1, 2, 3.

1. An officer must make out a bill of particulars, if demanded, before he can maintain an action for his fees; but it is not necessary where the party knows the items, and objects to them *in toto*. *Riddle v. The County of Bedford.* vii. 386
2. A county treasurer is an officer embraced within the 8th article of the constitution, and must take an oath of office; and he cannot sustain a suit to recover his fees as such officer, where he has not taken the oath, and there is no acquiescence by the defendant. *Ibid.*
3. It seems, as respects third persons, a person acting as an assessor is to be considered such, although he has not taken the oath of office. *Parker v. Luffborough.* x. 249

OFFICES.

See JUSTICE OF THE PEACE, 18.

1. The office of Lazaretto physician,

is in respect to the power of removal, completely subject to the controul of the legislature. *The Commonwealth v. Sutherland.*

iii. 145

2. There are matters of temporary and local concern, which, although comprehended within the term *office* have not been thought to be embraced by the constitution which gives to the governor the power of appointing offices established by law.

Ibid.

3. An act of assembly declaring, that an officer may be removed, on the application of certain persons, means, that he shall not be removed without such request. *Ibid.*

4. When a law providing for the appointment of officers by the governor, and limited to a period of years, is continued by a subsequent law, inducing a belief, that the legislature contemplated taking away the power of appointment from the governor, and especially, if material changes are made in the first law.

Ibid.

5. The power of appointing to, and removing from the office of inspector of salt provisions for the city, county, and port of Philadelphia, is vested in the governor. *Commonwealth v. Bussier.*

v. 451

6. The tenure of ministerial offices in general is during pleasure, unless the law establishing the office, order it otherwise. *Ibid.*

OFFICIAL BOND.

See BANKS, 18, 19, 22.

1. The remedy given by the act of the 5th of March, 1790, upon a sheriff's official bond, is not cumulative to that of the act of the 27th of March, 1713, but precludes a proceeding under that act. *Shaeffer v. Jack.*

xiv. 426

2. An action cannot be maintained on a sheriff's official bond, taken under the act of the 28th of March, 1803, in the name of the Commonwealth alone, for any injury done to an individual, by the official misconduct of the sheriff: nor can the court before which the cause is tried, permit the declaration to be amended, by the introduction of the name of the individual, as a party, so as to make it a snit for his use. *Dunn v. The Commonwealth.*

xiv. 431

3. A certified copy of a sheriff's official bond is not evidence, if it does not appear to have been taken by the

Recorder of Deeds, in the manner prescribed by law. *Ibid.*

ORDER.

See PAYMENT, 2.

ORDER OF COURT.

See BOOKS AND WRITINGS, 1, 2, 3, 4, 5.

ORDER OF REMOVAL.

1. On an appeal from an order for the removal of a pauper, by two aldermen, the Mayor's Court may in part quash the order, and in part confirm it. *Directors of the Poor of Bucks county v. Guardians of the Poor of Philadelphia.*

i. 387

2. By an order of two aldermen, a woman and her three children were removed from Philadelphia to Bucks county, on the ground of their all having a settlement there. The Mayor's Court, on an appeal, were of opinion, that the mother and one child had a settlement in Bucks. They therefore confirmed the order as to them. The other children, being under the age of seven years, they ordered to be sent to the place of their mother's settlement, for nurture only. *Held*, that this was not an original order, and that the Mayor's Court had a right to make it.

i. 387

3. Where children, under the age of seven years, are sent to the place of their mother's settlement for nurture, the expense of their maintenance is to be borne by the place from which they are removed, and not by that to which they are sent. *i.*

i. 387

4. It is not necessary that the order should specify the age to which the children are to be supported in the place to which they are thus removed, because the law fixes seven years as the age at which nurture ceases.

i. 387

5. Where, on appeal, an order of removal is in part confirmed, and in part quashed, neither party is entitled to costs. *i.*

i. 387

6. *Query*, If the place from which children are removed for nurture, is bound to give security for their maintenance?

i. 387

ORDINANCE.

See CONSTITUTION, 6.

ORPHANS' COURT.

See ADMINISTRATION ACCOUNT, 1, 3. DEPOSITION, 4. EJECT-

- MENT, 40, 61. EVIDENCE, 37, 120, 233, 311, 355. EXECUTOR, 1. FEES, 10, 11. FEIGNED ISSUE, 4. INTEREST, 1. LEGACY, 10, 11, 12, 13, 14. LIEN, 19. PAROL EVIDENCE, 8. PARTITION, 1, 2, 3, 4, 5. RECOGNIZANCE, 3. SCIRE FACIAS, 6, 7, 8.
1. Evidence may be given of a sale, under an order of the Orphans' Court, on the petition of an administrator, without producing the letters of administration, if it be shown that they are lost. *Huckle v. Phillips*. ii. 4
 2. It is not necessary, in order to authorize such sale, that the administrator should have first settled his administration account. ii. 4
 3. But it seems that, if, before the purchase money is paid, such account is settled, and a surplus remains in the administrator's hands, after paying all debts, the decree would not be valid. ii. 4
 4. A decree of sale, on the ground of maintenance of an infant child only, after former sales for payment of debts, is good. ii. 4
 5. The Orphans' Court has power to order a sale of real estate, for payment of the debts of the intestate, under the act of the 1st of April, 1814, by one administrator where there are several. *Biekle v. Young*. iii. 254
 6. Under the practice of the Orphans' Court, it is not an objection to an inquest, for partition of an intestate's estate, granted on the petition of one of the heirs, that it was done without notice to the widow or other children. But it is desirable, that they call the family before them, prior to the awarding of an inquest. *Rex v. Rex*. iii. 533
 7. The pendency of an action of partition, is no objection to the Orphans' Court proceeding to have partition made. *Ibid*.
 8. A decree of the Orphans' Court refusing to confirm an inquisition for the partition of lands under the intestate law, and setting aside the proceedings, in consequence of the exhibition of a paper, purporting to be the last will of the person who died seised, the validity of which had not been tried under an issue directed by the Register's Court, was affirmed by this court, notwithstanding the heirs at law had recovered a moiety of the land, in an ejectment against the widow who claimed the whole under the asserted will, and parol proof was given, that the validity of the will was directly in issue in that suit. *Shangler v. Rambler*. iv. 192
 9. When the estate of an intestate has been valued, in the manner prescribed by the intestate laws, and the husband of a female heir agrees to take it at the valuation, the Orphans' Court have no power to vest in him, for his own use, his wife's share of the estate; and if the court decree the estate to him in fee on giving recognizance for the payment of the shares of the other heirs, the decree as respects his wife's proportion, is void; and on her death, without having had issue, and without having done any thing to divest her title, her share descends to her heirs. A bona fide purchaser, for a valuable consideration from the husband is in no better situation than the husband himself. It seems, however, that the husband may hold, in his own right, those parts of the estate for which he has paid, or secured to pay the appraised value to the other heirs. *Fogelsonger v. Somerville and others*. vi. 167
 10. An order of confirmation by the Orphans' Court, of a report of auditors, on the final settlement of a guardian's account, finding a balance due from the ward to the guardian, is a final decree. *Case of John Richards*. vi. 462
 11. The Orphans' Court have no power to decree payment of a balance from a ward to a guardian, on the settlement of the guardian's account with the ward. *Ibid*.
The truth of the record of the Orphans' Court, concerning matters within their jurisdiction, cannot be disputed. *Selin v. Snyder*. vii. 166
 12. Where there is a judgment existing against an intestate, which is found by auditors, appointed by the Orphans' Court to absorb all the assets, neither they nor the Orphans' Court, have any power to decide who is entitled to the benefit of that judgment; the only object of their appointment is to make a division, *firo rata*, among the creditors, in certain cases mentioned in the act of 1794. *Byrne v. Walker*. vii. 483
 13. Where the husband of a daughter of an intestate petitions the Orphans' Court, in right of his wife,

- for a partition or appraisement of the real estate of the intestate, and agrees to take it at the appraised value, the Court have no right to award the whole estate to the husband in fee, upon his paying or securing to be paid, the shares of the other children. With respect to the shares of the other children, for which he was paid, the title is in him, but with respect to his wife's share, he has no greater interest, than in any other part of her real estate. *Stoolfoos and others v. Jenkins and wife.* viii. 167.
14. Where the Orphans' Court order the real estate of an intestate to the husband of a female heir, on his paying to the other heirs their respective shares of the appraised value of the land, the record of the proceedings of the Orphans' Court, is evidence in support of his title. *McCullough v. Wallace and another, Executors.* viii. 181
15. And if the husband has been in possession of the whole of the land, under a decree adjudging the whole to him in fee, he may after the death of his wife, recover the whole from a person who has entered without a better title. *Ibid.*
16. An order by the Orphans' Court for the sale of the real estate of an intestate, does not convert the realty into personalty: until an actual sale, confirmed by the court, the nature of the estate is unchanged. Where, therefore, a female heir dies, after the order is granted, but before a sale, her husband is not entitled, as her administrator, to the whole of her share of the money arising from the sale. He is only entitled, as tenant by the curtesy, to the interest of it during his life. *Ferree and others v. The Commonwealth, for the use of Elliott, Administrator, &c.* viii. 162
17. It seems the Orphans' Court cannot decree the payment of a distributive share, admitted by the administrator to be in his hands, where his accounts are filed in the register's office, and not brought into the Orphans' Court. *Flintham v. Forsythe.* ix. 133
18. But where the accounts of an administrator are brought into the Orphans' Court, it may decree payment of a distributive share to one heir, where there is no dispute between him and the administrator as to the balance due him, although the accounts are, on the application of other heirs, depending before auditors. *Ibid.*
19. The Orphans' Court cannot decree payment by an administrator of the costs recovered in a suit brought against him by an heir in a court of common law, to recover his distributive share. *Ibid.*
20. The Orphans' Court have power to open and re-examine an administration account, at any time during the term at which it was settled. *Metz's Appeal.* xi. 204
21. Where in consequence of proceedings in the Orphans' Court, for the valuation and partition of the real estate of an intestate, a part of it is allotted and decreed to A. the husband of a daughter of the intestate, in right of his wife, upon his giving a mortgage for a certain sum to the other children of the intestate, but no such mortgage is ever given; in an ejectment by another daughter of the intestate, for her share of the land thus allotted to A., the defendant may in order to show that the whole sum for which A. was decreed to give a mortgage, has been paid, give in evidence payments on account of the maintenance and education of the plaintiff while a minor by A., he being one of the guardians, and payments to her husband, after her marriage. *Smith v. Scudder.* xi. 325
22. But declarations by the husband of the plaintiff, with respect to the expenses of his wife's education before marriage, are not evidence. *Ibid.*
23. It is not error in such a case, to leave it to the jury to decide, in relation to transactions between the husband of the plaintiff and A., whether any, and what payments have been made, telling them at the same time, that any other dealings between the parties, than direct payments, ought not to be applied to the discharge of the plaintiff's claim, unless so understood and intended. *Ibid.*
24. Money received by the husband of the plaintiff, as the executor of A., when he has settled no administration account, and there is no evidence of any act of the executor, indicating any intention to separate any part of the money received by him as executor, and apply it to the satisfaction of his wife's claim, is no payment of the debt due in right of the wife; and the court ought not to

leave it to the jury, to infer satisfaction of the plaintiff's demand. The jury should be instructed, that as the evidence was of a bare receipt of money as executor, such receipt did not in law, amount to payment of the money due to the plaintiff.

Ibid.

25. Where one to whom the real estate of an intestate is allotted and decreed by the Orphans' Court, is ordered to give a mortgage or payment of the money, it is a condition precedent, without the performance of which no estate vests.

Ibid.

26. Of the effect of a decree of the Orphans' Court, in matters within its jurisdiction. *McPherson v. Cunliff and others.* xi. 422

27. The father of the plaintiff in ejectment, died intestate about the year 1794, seised in fee of a vacant lot, in or near the city of Pittsburg, then of little value. He had emigrated from Ireland about the year 1783, where, as it was afterwards discovered, he had left a wife by whom he had no issue, and who was living at the time the ejectment hereafter mentioned, was commenced. In 1785 or 6, he came to Pittsburg, bringing with him the plaintiff's mother, whom he called his wife, and a daughter by her, and in that year, while they cohabited as man and wife, the plaintiff was born. In the year 1790, the plaintiff's father purchased the lot in question for one hundred pounds. He built a small log house upon it, in which he resided with the plaintiff's mother, and the two children, always acknowledging her as his wife, and them as his lawful issue. In the year 1793, he separated from his reputed wife, and after putting his son, the plaintiff, out to board, he went with a cargo down the Ohio, leaving the daughter with her mother. In *February*, 1795, the plaintiff's mother and another person took out letters of administration on the estate of the reputed husband; and the personal estate being small, the administrators presented a petition to the Orphans' Court, praying an order for the sale of a moiety of the above mentioned lot, for the payment of the debts of the intestate, and the maintenance of the minor children. The order was granted, in pursuance of which a sale which was confirmed by the court, was made of

one fourth of the lot to C. and D. to whom a deed was made the 10th of *September*, 1795, and of another fourth to E. who received a deed from the administrators on the 1st of *March*, 1796. This sale being insufficient for the purposes for which it was made, the administrators of the 9th of *September*, 1795, obtained a second order for the sale of another fourth of the property, which was accordingly sold to F., to whom on the sale being confirmed, a deed was executed on the 4th of *February*, 1796. Before any sale was made an inventory was filed, but no written statement of the debts of the intestate. In *March*, 1796, an administration account was settled, and confirmed by the court; in which the administrators charged themselves with the amount of the inventory, with a small debt not included in it, and with the proceeds of the sale of the three-fourths of the lot which had been sold, and prayed a credit for the payment of the debts of the intestate, for the expense of maintaining the children, and for the erection of a building on the fourth part, which had been reserved. There was a small balance remaining in the hands of the administrators on the first sale, which was applied to the building of the house on the part which was reserved for the residence of the family. Guardians were appointed for the children of the intestate, as his legitimate children. On those parts of the lot which had been sold, buildings supposed to have cost twenty thousand dollars, had been erected, since the sales; and on the part reserved, there had been built, with the money arising from the sales, a brick house in which the reputed widow and children had constantly resided. The defendants derived their titles *bona fide* from the purchasers, and there was no imputation of fraud, either on their part or on that of the administrators. Nearly twenty years after the sales, the plaintiff, having discovered that his father had a wife in Ireland, went there, and obtained from his heirs, in consideration of the sum of seventy pounds, a conveyance, dated the 4th of *September*, 1815, for the whole lot; to recover which, he brought an ejectment in *August* term, 1816. *Held*, that the plaintiff was not entitled to recover.

Ibid.

28. A decree of the Orphans' Court confirming the settlement of an administration account, from which a balance appears to be in the hands of the executor, does not possess the character of a judgment, so as to entitle the person to whom the balance is due, to come in, as a judgment creditor, on a deficiency of assets. *Shaw v. McCameron et al. Administrators of Scott.* xi. 252
29. The Orphans' Court may amend its proceedings after a sale by an administrator under its order, by adding to the administrator's account exhibited, his affidavit, that the same was just and true, formerly taken in court but not filed. *Kennedy v. Wacksmuth.* xii. 171
30. The affidavit of one administrator to the truth of the account exhibited in the Orphans' Court, is sufficient, though there are other administrators. *Ibid.*
31. The decrees of the Orphans' Court may be controverted, where it exceeds its jurisdiction; but where it is acting within its jurisdiction, the truth of what is asserted on record cannot be denied, in a collateral proceeding. *Ibid.*
32. The Orphans' Court has no power to compel an executor to give security at the instance of one who has a right to the interest of a bequest, but no right to the principal until a future day. *Case of Johnson's Appeal.* xii. 317
33. A recognizance entered into in the Orphans' Court, by the son of a testator, conditioned for the payment, to his other children, of their shares of a certain real estate, which the testator by his will directed should be appraised on the arrival of the son at the age of twenty-one years, and that if he chose to take it at the appraisement he might do so on giving security to the other children of the testator, is not within the provisions of any act of assembly, and no action can be supported upon it. *President of the Orphans' Court of Dauphin county v. Groff.* xiv. 181
34. If the land for which a recognizance is given in the Orphans' Court, is sold under an order of that court for the payment of debts, it is a good defence to an action on the recognizance. *Ibid.*
35. A decree of the Orphans' Court, unreserved and unappealed from, cannot be questioned in a collateral suit, except in cases of fraud, or

where the defect plainly appears on the face of the proceedings. And where a party relies upon fraud, it ought to be distinctly and positively alleged, and not inferred merely from circumstances. *Ibid.*

36. Where the accounts of executors filed on citation by guardian of infants were referred, and the Orphans' Court confirmed the report of referees, *held*, that the decree of confirmation was subject to appeal, and might be reversed for error in law contained in the report appearing on the answers and admissions of the executors before the referees. *Case of Heager's Executors.* xv. 65

OVERPLUS.

See WARRANT AND SURVEY, 3, 12, 30.

- A. being seised of a tract of land, containing four hundred acres, conveyed to B. a part of it, described by boundaries, which, however, were vague, and did not completely surround it; and stated to contain two hundred acres *more or less*. It was afterwards surveyed by a person appointed by both parties, who informed them, that the survey contained two hundred acres with allowance of six per cent. for roads, &c. The land thus surveyed, was delivered by the grantor to the grantee, by whom it was held during his life, and by his widow after his death. After the death of both the grantor and grantee, and thirteen years after the execution of the deed, it was discovered, that the tract contained two hundred and thirteen acres, one hundred and forty-one perches, instead of two hundred acres. *Held*, That the heirs of the grantor were not entitled to recover the overplus of thirteen acres, one hundred and forty-one perches. *Glen v. Glen.* iv. 488

OVERSEERS OF THE POOR.

See PAUPER.

OUTLAWRY.

See PLEADING, 9.

OYSTERS.

Although a state may not have a right of absolute property in oysters, it may pass regulations for their preservation. *Kean v. Rice.* xii. 203

PAPERS.

See BOOKS AND WRITINGS.

PARDON.

See COSTS, 12. MAINTENANCE.

PARENT AND CHILD.

See IMPROVEMENT, 6.

PAROL.

1. Where a purchaser has an election among several tracts of land, such election, and notice of it, need not be in writing, but may be by parol. *Sweitzer v. Hummel.* iii. 228

PAROL AGREEMENT.

See ACTION, 12.

1. Possession had before a parol agreement of lease for seven years, and continued afterwards, is of too doubtful a nature to be considered as part performance, and to take the case out of the act for prevention of frauds and perjuries. *Jones v. Peterman.* iii. 543

PAROL AUTHORITY.

See PAROL SALE.

PAROL EVIDENCE.

See CORPORATION, 14. EVIDENCE, 47, 73, 162, 163, 164, 323. HUSBAND AND WIFE, 11. MORTGAGE, 8. NEGRO AND MULATTO. TRUST, 1.

1. Although a mistake in drawing articles of agreement may be proved by parol evidence; yet, in an action of covenant, upon written articles, the plaintiff is not at liberty to prove by parol evidence, an agreement different from that on which he declares. *Barndollar v. Tate.* i. 160
2. A lessee may give parol evidence, that the lessor undertook, at the time of the execution of a written lease, to perform a covenant agreed to be inserted in the lease, but omitted. *Christ v. Dittenbach.* i. 464
3. It is settled law, that parol evidence is admissible in cases of fraud, and of plain mistake in drawing a writing. ii. 464
4. When land is described by reference to matters not contained in the written contract, and resting on parol evidence, the jury are to decide, what land was the subject of the contract. *Richardson v. Lessee of Stewart.* ii. 84
5. In an action of slander for saying of the plaintiff, "The Reverend Thomas Smith is a perjured man," &c., parol evidence that the plaintiff

is a minister of the gospel is admissible. *Cummin v. Smith.* ii. 440

6. In an action for a breach of the defendant's agreement to keep fair and regular partnership books, parol evidence cannot be given of the contents of a book, which was not in the possession of the defendant on the trial, and of which no notice had been given him before the trial to produce. *Alexander v. Coulter.* ii. 494
7. The act of assembly of the 27th of February, 1798, does not take away the common law principle by which parol evidence is admissible. ii. 494
8. Parol evidence is not admissible to show, that the plaintiff was desirous of a postponement before the referees, but the defendant urged a decision, if it be offered not to impeach the award, on the ground of misconduct, partiality, or precipitancy, but to draw a conclusion, that it was not final and conclusive. *M'Dermot v. The United States Insurance Company.* iii. 684
9. Parol evidence is admissible to prove, that after the execution of a deed, conveying a right to a water-course through the granted land, by courses and distances, a verbal agreement was entered into between the parties, for their mutual accommodation, altering the route of the water-course; provided the agreement has been carried into effect. *Le Fevre v. Le Fevre.* iv. 241
10. In trover for promissory notes, the plaintiff may give parol evidence of their amount, without having given notice to the defendant to produce them. *M'Clean v. Hertzog.* vi. 154
11. Parol evidence may be given of what passed between the parties, at, and immediately before the execution of a written instrument, where a verbal promise made by one party, induced the other to execute the instrument. *Campbell v. M'Clenahan.* vi. 171
12. In a suit between parties to a written instrument, parol evidence cannot be received to vary its contents, even in the case of a clear mistake, or departure from written instructions so as to affect the interests of third persons uninformed of the facts, and who have *bona fide*, and for a valuable consideration, acquired rights under it. *Heilner v. Imbrie.* vi. 401
13. In a suit upon a bond, given for a pre-existing debt, due to the plaintiff by a third person, parol evidence

is not admissible to show, that at the time it was executed the obligee declared, that he would require nothing more than the interest to be paid during his life, and that at his death the bond should become null and void; unless the obligor was induced by such declarations to execute the bond. *Hain v. Kalbach.*

xiv. 159

14. Parol evidence is admissible, to show that a particular clause was inserted in an article of agreement by mistake. *Hamilton v. Asslin.*

xiv. 448

PAROL SALE.

See IMPROVEMENT, 4.

1. A testator left a widow and infant, and in his will gave a power of appointment and partition between them to the widow or child, and six executors. Three of the executors proved the will, and in conjunction with the widow executed the appointment and partition. There was no proof that the other executors had renounced.

Query, Whether the partition is valid? At all events it is not void, but voidable; and no person can object but the infant, after coming of age. *Burke v. Lessee of Young.* ii. 383

2. A sale of land by an agent under a parol authority is void; but if the sale by the agent be *subsequently* affirmed by the principal, he, and those who claim under him, are estopped from recovering the land in ejectment: and it immaterial in such case, whether a deed to the agent himself, under which he undertook, also, to make a title to the vendee, was genuine or forged. *Vanhorne and another v. Frick, Executor of Frick.* vi. 90

3. A parol sale by an agent, is as valid as a parol sale by a principal.

Ibid.

PARTIES.

See EVIDENCE, 280. FRAUD, 9.

Where the parties having the beneficial interest in a suit, appear on the record, the court will recognise them as such, and treat them accordingly. But it is not necessary to the validity of a judgment, that such parties should appear upon the record. If there be legal parties it is sufficient. *Reigart and another v. Ellmaker.* vi. 44

PARTITION.

See INFANT, 3. INQUEST, 1, 2, 3. ORPHANS' COURT, 6, 7, 8.

1. An intestate left a widow, a father, a brother, and sister, and no children. On partition of his real estate, by authority of the Orphans' Court, the share assigned to the widow was thrice the value of that assigned to the father; but the rents were nearly equal. The partition was set aside on account of its inequality. *Young v. Bickel.* i. 467

2. *Query*, Whether the Orphans' Court has power to make partition where the intestate leaves a widow, a father, a brother, and sister, and no children? If it has, such partition would be binding on the reversionary interest of the brother and sister. i. 467

3. It is not right, that persons connected by affinity with either party, should be placed on the inquest. i. 467

4. A testator left a widow and infant, and in his will gave a power of appointment and partition between them to the widow or child, and six executors. Three of the executors proved the will, and in conjunction with the widow executed the appointment and partition. There was no proof that the other executors had renounced.

Query, Whether the partition is valid? At all events it is not void, but voidable; and no person can object but the infant, after coming of age. *Burke v. Lessee of Young.* ii. 383

5. An equitable title is sufficient, in Pennsylvania, to recover upon in partition. *Willing v. Brown.* vii. 467

PARTNERS.

See ASSIGNMENT, 1. JOINT SUIT, 1, 2, 3. PROMISSORY NOTE, 5, 6. SET-OFF, 9, 10.

1. The administrators of a deceased partner do not make themselves liable to the surviving partner for all the partnership debts, by ignorantly taking possession of the partnership books, and collecting some of the partnership debts. *Alexander v. Coulter.* ii. 494

2. One partner cannot bind his co-partner by giving a note in the name of the firm, for his own private debt. *Baird v. Cochran.* iv. 397

3. When a surviving partner dies indebted to partnership and separate creditors, and leaving in the hands of his administrator joint property, and also separate property, as the joint creditors receive from the por-

- tion of such partner in the joint property, and, then the balance of the separate property shall be divided among them *pro rata*. *Bell v. Newman*. v. 78
4. If A. and B. agree that A. shall receive as a compensation for his services, half the profits of a store, they are partners as respects creditors. *Purviance v. M'Clintoc and others, Executors of Dryden*. vi. 259
5. If parties associated in business in such a manner as to make them partners with respect to third persons, expressly agree that a partnership shall not exist, they are not partners as between themselves. *Gill and others v. Kuhn*. vi. 333
6. If a partner acknowledge the correctness of the credits and debits of an account taken from a ledger, the entries in which were nearly all in his own hand-writing, but at the same time deny his obligation to pay the balance, alleging the existence of a partnership between himself and the plaintiffs, this is not sufficient to charge him upon an *insimul computassent*. *Ibid*.
7. If a house, consisting of several acting partners, carry on business in the name of one, he cannot alone maintain an action for goods sold by the house, though the contract was made with him only. Nor can the names of the other partners be added after the action is brought. *Wilson v. Wallace, Executrix*. viii. 53
8. A. by order of B. chartered a vessel to take a cargo of flour and Indian corn on freight from Philadelphia to Lisbon. Part of the flour belonged to A. part to B. and the remainder to C.; and the share of each was paid for out of his separate funds. A. effected separate insurance on his own interest. The whole of the shipment was consigned to C. in Lisbon, and the whole appeared as his property, for the purpose of protecting it from British cruisers. Had the vessel arrived at Lisbon, the whole of the flour was to have been sold by the consignee; and the nett proceeds of A's interest, remitted on his account to his correspondent in London. *Held*, that A., B. and C. were partners, and individually liable for the whole amount of a general average due upon the flour. *Sims v. Wilting and others*. viii. 103
9. Assumpsit does not lie by one partner against another, unless there be an account actually settled between themselves, and a balance struck. It is not sufficient that the balance may be deduced from the partnership books. *Andrews v. Allen*. ix. 241
10. A guarantee given by one partner in the name of the firm does not bind his co-partner, unless it be in the regular line of business, or be afterwards adopted and acted upon by the co-partner. *Sutton and M'Nickle v. Irvine et al*. xii. 13
11. One partner may bind his co-partners, by an agreement not under seal, to refer any partnership matter. *Taylor et al. v. Coryell*. xii. 243
12. A dormant partner is not responsible for the debts of the firm, contracted after he has ceased to be a partner, but before public notice is given of the dissolution of the partnership. *Armstrong et al. v. Hussey et al*. xii. 315
13. A. and B. partners, stored certain articles with the plaintiff, agreeing to pay a certain rate of storage per month, and afterwards authorized the plaintiff to sell the same as their factor. A. and B. dissolved partnership, and B. was authorized to settle the partnership concerns. The plaintiff sold large parcels of the articles, and paid the proceeds to B. who signed a receipt for the same, in his own name, "for A. and B." At this time, a sufficient portion of the articles remained in the plaintiff's hands to pay the storage and factorage expenses, but the plaintiff subsequently delivered to B. at his request, a portion of the remainder of the articles; and when the plaintiff sold the residue, they were insufficient to pay his expenses. A. afterwards died solvent, and B. died insolvent; *held*, that A's estate continued liable to the plaintiff. *Cope v. Warner*. xiii. 411
14. What circumstances will give to a separate debt of some of the partners the character of a partnership debt. *Kuhn v. Nixon*. xv. 118
15. Agreement between B. and H. that H. should give his attendance and services in the grocery store, then carried on by B., for which B. should pay H. a salary of one thousand dollars per annum, as well as to pay and allow him a commission of seven per cent. on the profits arising from goods sold after deducting the said salary and rent of store, which

agreement was carried into effect: *Held*, not to constitute H. the partner. *Müller v. Bartlett*. xv. 137

PARTNERSHIP.

See EVIDENCE, 183, 285, 329. PARTNERS, 4, 5, 6. SET-OFF, 9, 10. WITNESS, 17, 74.

1. If it clearly appear that payments by the plaintiff for the defendant were made on account of an unsettled partnership concern existing between them, they cannot be recovered *in assumpsit*; but unless this clearly appear the court may receive evidence of them, and give them in charge to the jury explaining the liability of the defendant. *Patton's Administrators v. Ash*. vii. 116
2. Real estate taken by partners on ground rent, and buildings erected thereon for the purpose of carrying on glass-work in partnership, afterwards mortgaged by one partner without notice to the mortgagee of partnership debts then existing, is to be considered as between the mortgagee and partnership creditors, as real estate, and liable, in the first instance, to the mortgagee. *McDermot v. Laurence*. vii. 438
3. By *express agreement*, a partnership may continue after the death of one of the partners. *Gratz et al. v. Bayard et al. Assignees of Carroll*. xi. 41
4. A. and B. entered into written articles of partnership, which was to continue five years. In case of the death of A. within the five years, the business of the firm was to be carried on by B. for the joint benefit of himself and the heirs of A. "subject to the advice and inspection of the executors or administrators of A." And in case of B's death, A. was to close the concern as soon as circumstances would admit. The partners were to be equal sharers in the profit and loss. When the articles were drawn, it was intended to fix the capital, for which a blank was left, and was to be advanced by the partners equally; and A. was to advance a sum, also left blank, over and above the stipulated capital, for which he was to be allowed interest, at the rate of six per cent. per annum. But, by an additional article bearing the same date, after reciting that the funds of B. were engaged, so as not to be at his own disposal, it was agreed, that the capital of the firm should for the pre-

sent remain undecided, but be fixed on B's return from the *West Indies*, and in the mean time A. was to be allowed by B. interest at six per cent. on a moiety of whatever capital A. might think proper to employ in the business of the firm. A. died on the 20th of *June*, 1817, intestate. Letters of administration on his estate were granted on the 1st *July*, 1817, to C., D. and E. and on the same day B. was appointed guardian of the minor children of A. On the 2d of *October*, 1819, the firm being insolvent, B. assigned all the partnership property, and all his own private property, to the defendants for the benefit of the creditors, who were to be paid in the order in which they were designated in the deed of assignment, in which the plaintiffs stood first. Considerable sums were paid by the administrators of A. to B. as guardian of the minors, all of which were expended by him in the affairs of the firm. The insolvency was produced principally by losses on an establishment at a distance, which was planned by A. *Held*, that the whole of the partnership fund, including what was acquired by the death of A., passed by B's assignment, and the plaintiffs were entitled to be paid the amount of their debt. *Ibid*.

5. *It seems*, that, for want of a court of chancery, provision in the article of agreement, that B. in the event of his partner's death, was to carry on the business *subject to the advice and inspection of his executors or administrators*, gave no power to the executors or administrators to dissolve the partnership, in case B. should act in opposition to their advice. *Ibid*.

PARTY WALL.

The right in the first builder to reimbursement for the expense of a party wall, is a personal right against the second builder, and on payment thereof by the owner of the adjoining lot to the first builder, the claim of the latter is at an end, and a purchaser from him cannot afterwards recover it when a second building is erected, although there is no instrument on record nor notice of such payment. *Hart v. Kucher*. v. 1

PATENT.

See ACT OF ASSEMBLY, 9, 10. EQUITY, 1, EVIDENCE, 26, 30, 31, 77, 97,

168, 175. IMPROVEMENT, 8. TRUSTEE, 1.

1. A patent obtained by misrepresentation, deceit or forgery, or through ignorance of facts, on the part of the officers of the land office, does not legalize an unauthorized survey. The adverse party is at liberty to prove the deceit and fraud practised to obtain the patent. *Burd and another v. Seabold.* vi. 137
2. Payment of taxes due by the prior owner is a subject of deduction from the purchase money, if a lien; but not payment to a patentee for the use of a hopper boy, &c. to a mill, which were on it when bought, if the patent were void. *Fulweiler v. Baugher.* xv. 45

PATENT RIGHT.

See COURT, 21. EVIDENCE, 130. PLEADING, 21, 22.

It seems that a party would not be bound by the purchase of a patent right, who had supposed it to be valid, when in fact it was invalid: but such misconception cannot be taken advantage of by the defendant when the equity is not spread on the record, but issue is taken on a want of consideration coupled with fraud. *Bellas v. Hays.* v. 427

PAUPER.

See ORDER OF REMOVAL, 1. TOWNSHIP, 3.

1. Where a pauper was chargeable to a township which was divided, it was held, that the overseers of the poor of one of the townships which maintained him after the division, might sustain *assumpsit* against the overseers of the poor of the other township for a rateable proportion of the expense. *Overseers of North White-hall v. Overseers of South White-hall.* iii. 117
2. If an unmarried indented servant become pregnant, and be removed by her mistress into another township for the purpose of lying in, the expenses of which her mistress is able, and agrees to pay; the overseers of that township, may, before the birth of the child, remove her to the place of her last legal settlement. *Guardians of the Poor of Philadelphia v. Overseers of the Poor of Bristol.* vi. 562
3. But they have no power to have her removed to her mistress. *Ibid.*
4. In an action by the directors of the poor, &c. upon an assumption by the

defendant to support a person who afterwards became a pauper and was maintained by the plaintiffs, a taxable and taxed inhabitant is a competent witness for the plaintiffs, under the 10th section of the act of the 27th of March, 1823. *Thornbury et al. v. The Directors of the Poor, &c. of Adams county.* xii. 110

5. Where the declaration in such an action, avers that the pauper had a right of settlement in the county, and was regularly sent to the poor-house by an order of two justices, it is necessary to prove such order, notwithstanding the declaration contains a general count for money laid out and expended by the plaintiffs for the use of the defendant, at his special instance and request; there being no evidence of such request. *Ibid.*
6. By the act of assembly of the 11th of March, 1807, the directors of the poor of Franklin county, may themselves bind apprentices; such children as shall come under their notice as paupers, by a warrant from two justices of the peace; and they may also, in conjunction with two justices, bind, "such children whose parents are dead, or as shall by them, the said directors and two justices, be found unable to maintain them." *The Commonwealth v. Walker.* xii. 169
7. If a healthy stranger, who meets with an accident which renders it impossible for him to be removed, be received into the plaintiff's house, and taken care of at the desire of the overseers of the poor, who employ a physician to attend him, the township is bound to pay for his board, and other reasonable expenses incurred by the plaintiff, without a previous order of maintenance. *Overseers of the Poor of Roxborough v. Bunn.* xii. 292
8. The right of the plaintiff to recover under such circumstances, is not affected by his not having given notice, that he had in his house such a person, agreeably to the 25th section of the act of the 9th of March, 1771; nor by the circumstance of the pauper's name not having been entered in the books of the township. *Ibid.*

PAYMENT.

See BILLS OF EXCHANGE, &c. 9. BOND, 2. CHECK, 1, 2. EXTINGUISHMENT. JUDGMENT. PLEADING, 19, 44. PROMISSORY NOTE.

1. An acknowledgment of payment of the purchase money in the body of a deed, and a receipt indorsed, are not conclusive evidence of such payment. *Hamilton v. M'Guire.* iii. 355
2. In an action on a bond given in consideration of the plaintiff having charged the defendant on oath with being the father of a bastard child begotten on her body, and her swearing also that no other person had carnal knowledge of her body, evidence is admissible under the plea of payment, with leave, that another person had carnal knowledge of the plaintiff. *Carpenter v. Groff.* v. 162
3. The lapse of less than twenty years may, with other circumstances, afford a presumption of payment of a bond, but without circumstances, it must be at least twenty years to raise the presumption. *Henderson v. Lewis.* ix. 379
4. The possession by the defendant of an order on him, signed by the plaintiff, to pay money to a third person, whose receipt is indorsed, but not proved, if not objected to as evidence to go to the jury, may be charged by the court to be evidence of payment, though not conclusive. *Weidner v. Sweigart.* ix. 385.
5. Where a chose in action is transferred to a creditor by his debtor, the presumption is that it is not intended as payment, if not so expressed. *Leas v. James.* x. 307
6. Of the plea of payment in Pennsylvania. *Lewis et al. v. Morgan et al.* xi. 234

PAYMENT WITH LEAVE.

1. Under the plea of payment with leave, the jury cannot find any sum due from the plaintiff to the defendant. *Anderson's Executors v. Long.* x. 55
2. Under the plea of payment to a *scire facias* on a mortgage, the mortgagee may give evidence to show a variety of circumstances between the parties previous to its being given, proving circumvention, and deception on the mortgagee, and that a judgment in ejectment against the mortgagor, which was one of the inducements to his giving the mortgage, was obtained by surprise and improperly used by the mortgagee. *Robinson v. Eldridge.* x. 140
3. Parol evidence is admissible under the plea of payment to a suit on bond

against a surety, to show, that he executed the bond under a declaration by the obligee, that his signing was mere matter of form, and that he never should be called on for payment. *Miller v. Henderson.* x. 290

4. If the defendants plead payment with leave, and go into an equitable defence, the plaintiff may, under the replication of *non solvit*, give evidence of other special matter to rebut the defendant's equity. *M'Cutcher v. Nigh.* x. 344
5. In a suit on a forfeited recognizance for a party's appearance at the next Court of Quarter Sessions, to answer a charge of fornication and bastardy, on the pleas of payment and *nil debet*, evidence is not admissible, that the party had married the mother after the date of the recognizance. No evidence is admissible under these pleas, but what tends to show, either that the recognizance was not forfeited, or that it had been remitted by lawful authority.

It is an error for the court to charge the jury on such pleas, that although the party did not appear, yet if he married the mother, even with the fraudulent intention of deserting her after marriage, the defendant was entitled to a verdict, unless privy to the fraud. *Commonwealth v. Nowland.* x. 355

6. Under the statement law, the plea of payment, with leave to give the special matters in evidence and notice given and accepted, and evidence without objection at the trial, may be considered a counter statement. The plea of payment with leave to a statement, does not admit any fact not mentioned in the statement: if essential, the plaintiff must prove it. *Schlatter v. Etter.* xiii. 86
7. In an action against the purchaser of a steam-mill, by the vendor, who was his partner in the mill, to recover the purchase money, the defendant cannot, under the plea of covenants performed with leave, give evidence to show failure of consideration, or non-performance by the plaintiff of covenants contained in the articles of co-partnership.
8. Query, If he could on the plea of set-off, or notice of set-off under the plea. *Evans v. Negley.* xlii. 218

PENAL LAWS.
See ACTION, 6.

The punishment of voluntary manslaughter is not within the 10th and 11th sections of the act of April 22d, 1794, and therefore a person convicted of that crime cannot be sentenced to undergo confinement in the solitary cells on low and coarse diet. *White v. Commonwealth.* i. 139

PENALTY.

See FEES, 12.

PENITENTIARY.

See ASSAULT AND BATTERY, 2, 3.

PENN TOWNSHIP.

Notwithstanding the order of the Court of Quarter Sessions of the county of Philadelphia, made on the 13th of October, 1808, by which part of the township of the Northern Liberties was taken off, and erected into a separate township, by the name of Penn township, the said Penn township continues to be included in the incorporation created by the act of the 29th of March, 1803, so far as relates to the payment of taxes assessed for the support of the poor. *Clifford v. Belsterling.* ii. 108

PERSONAL ESTATE.

See REAL ESTATE.

PHYSICIANS.

Physicians may sue for their fees. *Mooney v. Lloyd.* v. 412

PILOTAGE.

See ASSUMPSIT, 7.

PLEADING.

See AMENDMENT, 14, 15, 16, 17, 18, 19, 20. CORPORATION, 10, 24. COVENANT, 9, 10, 11, 12. DECLARATION. EJECTMENT, 37. ERROR, 111. EVIDENCE, 2, 83, 92, 109, 133. EXECUTOR, 5. FORMER RECOVERY, 1. ISSUE. JUDGMENT, 30, 32, 49. JURISDICTION, 1, 2, 3. PAYMENT. PRACTICE, 3, &c. RECOGNIZANCE, 8, 14. SATISFACTION, 1. SCIRE FACIAS, 4. SHERIFF'S BOND, &c. 1, 3, 4. SLANDER, 5, 6, 13, 16. STATEMENT.

1. An agreement to enter an amicable action was signed by one defendant in a suit against two, stipulating that the defendants should plead *instantly*; a narr was filed against both, and the plea was afterwards entered defendant pleads, &c. the replication was that they had not perform-

ed, &c. *held*, that both defendants had appeared and pleaded. *Dickey Schreider.* iii. 413

2. Where, on articles of agreement for the purchase of land, the execution of the deed is postponed beyond the time originally stipulated by the consent of the purchaser, in case of a breach on his part in not paying the purchase money, a declaration should be framed suited to the circumstances of the case. *Jordan v. Cooper.* iii. 564
3. If a covenant be alleged in the narr to be made by the defendant, his heirs, executors, and administrators, but the covenant does not mention heirs, the variance is not material where the action is against the person covenanting. *Ibid.*
4. When the prothonotary by rule of court, is authorized to join issue, it is not error, that there is no rejoinder to a replication of fraud. *Ibid.*
5. Coverture, after the bringing of the suit, cannot be pleaded after a plea in bar; in which case it may be done, but the defendant must not suffer a continuance to intervene between the happening of this new matter or its coming to his knowledge and pleading it. *Wilson v. Hamilton.* iv. 238
6. The plaintiff is not bound to reply to a plea in abatement put in out of time. Therefore, if the cause be tried on the former pleas, though no issue be joined on a plea in abatement, it is not error. *Ibid.*
7. If a *capias* issue against two in debt on a bond, and one be taken and *non est inventus* be returned as to the other, if the plaintiff declare upon the bond as the bond of the one only who is taken, advantage can be taken of the variance only by demurrer; it is not error after verdict. *Dillman v. Shultz.* v. 35
8. *Query*, Whether at any period, advantage can be taken of such variance between the writ and declaration? *Ibid.*
9. In Pennsylvania there being no outlawry in civil cases, the return of *non est inventus* has the same effect. *Ibid.*
10. In slander, the declaration was entitled Dauphin county, to wit; and stated that the defendant, on the 5th of July, 1814, at the county of Cumberland, to wit, in the county of Dauphin, in a certain discourse which he then and there had, of and concerning the plaintiff, and of and

- concerning the murder of a certain *Isaac Wills*, who before that time was killed and murdered, he, the said defendant then and there uttered, &c. *Held*, good after verdict. *Wills v. Church*. v. 190
11. The want of a plea in replevin is error, and is not cured by the parties having given bonds to the sheriff and a trial on the merits. *Lecky v. M'Dermot*. v. 331
12. The plea of nothing in arrear in replevin, admits the tenancy and puts the defence on matters subsequent. *Hill v. Miller*. v. 355
- There is no general issue to an avowry. *Ibid.*
13. A declaration for not fattening cattle, stating an agreement by which the plaintiff was to deliver to the defendant cattle to be pastured and fattened at a certain price, that the plaintiff promised to pay, and that the agreement being assented to by both parties, the cattle was afterwards, to wit, on the day and year before mentioned, delivered to the defendant, who then and there promised to fatten them; is bad after verdict, for want of stating that the defendant's promise was in consequence of the plaintiff's promise or of his delivering the cattle. *Morse v. Whitall*. v. 358
14. It seems it is bad also for want of stating, that the promises were at the same instant of time, a promise made in consideration of a previous promise of the other side, being *nudum pactum*. *Ibid.*
15. A verdict cures the omission to state, that the cattle were left a sufficient length of time to fatten. *Ibid.*
16. In an action for breach of promise made by the defendant in consideration of a promise on the part of the plaintiff, it is not necessary to state performance by the plaintiff, of the promise on his part. *Ibid.*
17. The appearance of an infant by attorney, is error. *Mooré v. M'Ewen*. v. 373
18. If it be assigned for error, that an infant appeared by attorney, the plea of *in nullo est erratum* confesses the fact. *Ibid.*
19. Where the defendant pleads *non assumpsit* and payment or set-off, his failing to prove his claim against the plaintiff is no acknowledgment of the plaintiff's debt. *Rogers v. Old*. v. 404
20. An agreement under the seal of the defendant; is evidence on the plea of *non est factum*, though the other contracting party is a third person whose authority as agent of the plaintiff is not shown. *Bellas v. Hays*. v. 427
21. It seems that a party would not be bound by the purchase of a patent right who had supposed it to be valid, when in fact it was invalid: but such misconception cannot be taken advantage of by the defendant when the equity is not spread on the record, but issue is taken on want of consideration coupled with fraud. *Ibid.*
22. When a vendor of a patent right agreed "to complete and perfect a conveyance by deeds duly executed and acknowledged, and as soon as practicable forwarded to the vendee," the conveyance must be executed and acknowledged as well as forwarded, as soon as practicable after the agreement, and acquiescence by the defendant, dispensing with such performance, must be specially set forth in the pleadings. *Ibid.*
23. In a declaration on a promise to pay, in consideration that the plaintiff would forbear to sue another, it is sufficient to state that other was indebted without averring the debt was then payable. *Johnes v. Potter*. v. 519
24. An averment that one was indebted, is not ground to infer that the debt was then payable. *Ibid.*
25. Where a plea consists solely of matter of record, as for example, "there is no such judgment," in a *scire facias post annum et diem*, the replication should re-assert the record, and conclude, by praying that it may be inspected by the court. If it conclude to the country, it is error. *Sharé v. Becker*. viii. 239
26. Where a judgment, entered by the prothonotary under a warrant of attorney, pursuant to the 28th section of the act of the 24th of February, 1806, is opened, and the defendant let into a defence, neither declaration nor statement is necessary. *Reed v. Pedan and others*. viii. 263.
27. It seems therefore, that an imperfect statement, in such a case, would be mere surplusage; but if it be not, it is not to be examined as critically as a declaration; and if it give information of the nature of the plaintiff's claim, and enable the defendant to plead a judgment on it,

- in bar of any other action, it is sufficient. *Ibid.*
28. Where the defendant has pleaded specially a matter which might have been given in evidence under the general issue, it seems that the want of a replication to such plea is not error. *Ibid.*
29. "*The Lottery Act*," without more, is an insensible plea, and need not be replied to. *Ibid.*
30. The plea of "not guilty" in *assumpsit*, is cured by verdict. *Cavene and another v. M'Michael.* viii. 441
31. After the plaintiff has closed his evidence, the defendant cannot introduce a plea of set-off. *Glazer v. Lowrie.* viii. 498
32. Where payment is pleaded and issue joined thereon, the short entry of set-off added thereto is only a notice and not strictly a plea, and therefore, requires no replication. *Henderson v. Lewis.* ix. 379
33. Where the defendant pleads payment to debt on bond, with leave to give want of consideration, and special matters in evidence, he can only give such matters in evidence as show that the plaintiff had no right to recover; but where he pleads payment with leave to give defalcation in evidence, he may give in evidence, matter entitling him to recover against the plaintiff under the defalcation act. *King v. Deihl.* ix. 409
34. In a covenant on an agreement to make the plaintiff a title on a day certain, in consideration of which he was to give bonds, if he aver a readiness to perform, and the defendant put in issue by his plea the plaintiff's readiness to perform, it is sufficient on the trial, if the plaintiff show that the defendant had no title on the day: he is not bound to show performance or tender. *Knox v. Rhinehart.* ix. 45
35. In an action on a decree in equity in another state for the payment of money, the pleas of *nul debet* and *nul tiel record*, are both bad on general demurrer. *Evans v. Tatem.* ix. 252
36. If the defendant mean to deny the existence of such decree, he may frame a plea to meet the averment of the decree in the declaration, and such plea must conclude to the contrary. *Ibid.*
37. A special plea of fraud and covin to debt on a single bill is in nature of a special *non est factum*, and if the plaintiff reply to such plea, that it is his deed on which issue is joined, and a verdict given for the plaintiff, the judgment is regular. *Stoever v. Weir.* x. 25
38. The want of a similiter to join the issue in the plea of not guilty to an indictment, is amendable in the court below. *Wilson v. The Commonwealth.* x. 373
39. A declaration stating that when a certain promissory note which the defendant had indorsed, was about to become due, the defendant, well knowing, as well that the same note would not be paid by the maker, he having lately before absconded, as that the defendant was in law and justice bound to pay the sum of money mentioned in the said note; he the plaintiff, having lent to the defendant when he delivered the note to him the sum therein specified, directed his agent, E. K., to pay the sum of money in the said note specified, when the same should become due, without setting forth any farther consideration, or averring a demand upon E. K., the defendant's agent, is good after verdict. *Shaw v. Redmond.* xi. 27
40. Where a rule of court directs the prothonotary, upon a plea or pleas being entered, to put the cause at issue, and enter the proper replications and other pleadings, for that purpose, it is not error if the cause has been tried without a replication to the plea of *non assumpsit infra sex annos*. And it seems, it would not be error if there were no such rule of court. *Ibid.*
41. A variance between the writ and declaration is matter of abatement, or special demurrer, and not of review on writ of error. *Newlin v. Palmer.* xi. 98
42. Debt for rent, three hundred and seventy-five dollars. The declaration contains two counts, for two distinct years' rent, three hundred and seventy-five dollars each. The *queritur* demands three hundred and seventy-five dollars. Verdict for less than that sum, the declaration is good. *Ibid.*
43. The defendant has a right, during the trial, to change his plea. *Hopkins v. Mehaffy.* xi. 126
44. A foreign attachment cannot be given in evidence, under the plea of payment, in an action of debt against the garnishee. It should be pleaded

- specially; or if the plea be payment with leave, &c., notice should be given to the plaintiff of the defendant's intention to give the attachment in evidence. *Updegraff et al. v. Spring, for the use of Henry.* xi. 188
45. A foreign attachment, which after pending some time has been compromised, is a good plea in bar, (so far as respects interest) to an action against the garnishee, to recover the debt attached; and it is error to refuse to permit such a plea to be entered at the trial. *Ibid.*
46. In an action upon the act of congress of the 19th of April, 1816, imposing new duties on licenses to distillers of spirituous liquors, the term during which the defendant used the still, and the sum claimed for double duties, should be stated in the declaration; and the omission to state them is not cured by verdict. *Buckwalter v. The United States.* xi. 193
47. A declaration demanding two distinct penalties, and double duties for the use of two separate stills, is bad; the use of the stills being a single act, for which a single penalty can be recovered. *Ibid.*
48. The Court of Common Pleas has jurisdiction of actions, arising under the act of congress above mentioned. *Ibid.*
49. Where, in a contract for the sale of land, the vendee agrees to pay part of the purchase money on the delivery of the deed, and the residue in instalments, and the vendor stipulates to procure, within twelve months, a good and sufficient title, derived from the commonwealth, and on such title being produced, the vendee agrees to execute a mortgage on the premises, and give his bond, with warrant of attorney, &c. to secure the payments aforesaid; in an action by the vendee against the vendor or his securities, for not procuring a good and sufficient title, the plaintiff must aver in his declaration, that he was ready to perform his part of the agreement. *Grace et al. v. Regal.* xi. 351
50. If the plaintiff declare against six defendants, and take judgment against three only, without noticing the others, it is error. *Latshaw et al. v. Steinman.* xi. 357
51. The declaration ought to be against those who were summoned, with an averment, that process had issue against the others, who were not to be found. *Ibid.*
52. A statement may be filed, under act of the 21st of March, 1806, in a suit brought to recover a sum of money paid by the plaintiff as bail of the defendant. *Thompson v. Gifford.* xii. 74
53. That act authorizes the filing of a statement, on an appeal from the judgment of a justice of the peace. *Ibid.*
54. An action for a legacy is not within the provisions of the act of the 21st of March, 1806, authorizing a statement to be filed, instead of a declaration. *Meals et al. Executors, v. Wiley et ux.* xii. 96
55. A declaration setting forth an implied promise by an *administratrix*, as such, to pay money paid, laid out, and expended by the plaintiff, for her use as *administratrix*, in consequence of the payment, after the death of the intestate, of a debt for which he and the plaintiff were jointly liable in his lifetime, is good; and a judgment *de bonis intestati*, founded upon it may be supported. *Collins, Administratrix v. Weiser.* xii. 97
56. A count in slander, stating merely that the defendant charged the plaintiff with the crime of forgery, is bad. *Yundt v. Yundt.* xii. 427
57. Coverture may be pleaded in abatement or in bar, according to circumstances. *Steer v. Steer.* xiv. 379
58. In an action of debt on a bond, executed by the defendants directly to the plaintiff, during her coverture with one of them, coverture is a plea in bar. *Ibid.*
59. *Scire facias* on a judgment to recover a debt, which the plaintiff stated he had recovered, of four hundred and forty-three dollars seventeen cents: on *nullius in terra* record pleaded, the judgment produced was for nine hundred and eighty-seven dollars: *held*, that the defendant was entitled to judgment. *Walker v. Pennell.* xv. 68
60. Pleas: payment with leave and conditions performed, with leave, &c. replication, issue, &c. is a good joinder of issue after verdict. *Roth v. Miller.* xv. 100
61. In a suit on a bond of indemnity, if the *narr.* sets out the condition to be, to keep the plaintiff indemnified against certain bonds, describing them, and breach in not so doing, pleas of payment and conditions

performed, admit the bonds as stated. *Ibid.*

62. Plea in abatement is too late after a general imparlance. *Witmer v. Schlatter.* xv. 150

63. Where the defendants have in one action abated the suit by pleading other persons joint contractors not named in the writ, and a new suit is brought, a similar plea in abatement will not be allowed in such second suit though put in by the defendants, who were not parties to the first suit. *Ibid.*

PLENE ADMINISTRATIVIT.

1. Upon a general plea of *plene administravit*, the jury have no right to apportion the assets; but must find for the plaintiff to the amount of all the assets remaining unadministered. Where an executor has assets, but not sufficient to pay all the debts, he can protect himself, only by pleading a special *plene administravit*, of all beyond a sum sufficient to satisfy debts of a higher nature, and to pay other debts of equal degree their proportions. *Shaw v. Cameron et al. Administrators of Scott.* xi. 252

POOR.

See EDUCATION, 1. ORDER OF REMOVAL. PAUPER. SLAVE.

1. Justices of the peace have jurisdiction where a man deserts his wife, though she has no children. *Overseers of the Poor v. Smith.* ii. 363
2. It is not necessary that the defendant should have notice, in such case, previous to the seizure of his property. iii. 363
3. Nor that he should be bound over to the sessions, or process issued to bring him in. ii. 363
4. The township may proceed by seizure to indemnify themselves, without the wife's consent. ii. 363
5. The defendant has a right to prove to the Quarter Sessions, that he had not deserted his wife, but she had deserted him. ii. 363
6. The poor of the county of Dauphin, being supported by funds raised by a tax on the whole county, a sentence that one convicted of fornication and bastardy shall give security to indemnify any particular borough, township, or district, is erroneous. *Dorsey v. The Commonwealth.* viii. 261

POOR LAWS.

See ASSUMPSIT, 3.

POSSESSION.

See EASEMENT, 1. EJECTMENT, 42, 43, 44. EVIDENCE, 117. LANDLORD AND TENANT, 7, 8. LANDS, 7. LEASE, 2. LIMITATION, ACT OF, 10. MORTGAGE, 2. NOTICE, 9. SETTLEMENT. SURVEY. TRESPASSER.

1. Where there is no interference, possession of part is possession of the whole. *Burns v. Swift.* ii. 436
2. A demand of possession is waved when the tenant on being informed of the plaintiff's claim, previously to bringing the ejectment, refuses to recognize it. *Youst v. Martin.* iii. 423

POUNDAGE.

See LIBERARI FACIAS, 2.

POWER.

See AGENT, 1. AUTHORITY, 1. COUNTY COMMISSIONER, 9, 10, 11, 12. EVIDENCE, 140, 176. PAROL SALE, 1, 2. VENDOR AND VENDEE.

1. A power was given to A. by will, to dispose of a portion of the testator's estate among such of the testator's grandchildren as A. thought proper, "by any writing under his hand and seal, executed in the presence of two or more credible witnesses." A. made a testamentary writing in the form of a letter, disposing thereof, signed but not sealed or attested. She afterwards acknowledged it to be her will, and procured a codicil to be written to it, on a separate paper relative to her own property, which codicil she signed opposite a seal, and acknowledged both papers in the presence of three witnesses. *Held*, that it was a good execution of the power. *Porter v. Turner.* iii. 108
2. T. F. by bargain and sale conveyed all the parts and purparts, shares and dividends, of him, the said T. F. in the messuages, lots of ground, lands, ground rents, tenements, and hereditaments, and real estate, which his father lately died seised of, to two trustees upon trust, that they and the survivor, and the heirs and assigns of the survivor, should during the natural life of T. F., let the premises, receive the rents and income, and pay the surplus, after deducting ground rents, &c. into the proper hands of T. F. and not to any agent he might appoint during his natural life, or apply the same to his maintenance, and from and after his decease, in trust for his children, in fee simple, and in case he left no

children, then to and for the use of the right heirs of the said T. F. for ever. Provided always that it should be lawful for T. F. with the consent and approbation of the said trustees or the survivor of them, or the heirs of the survivor, by any deed under their hands and seals duly executed and acknowledged, to grant or convey all, or any part of the premises, to such person or persons, and for such uses or estates as the said T. F., with such consent and approbation should direct, limit, or appoint. The real estate of the father was afterwards sold by order of the Orphans' Court, and with part of the monies paid to the trustees, they purchased a house in the city of *Philadelphia*, which was conveyed to them on the same trusts; the residue was placed and continued at interest. T. F. made his last will, (subscribed by the trustees,) reciting their approbation and consent, testified by their subscriptions to the will, and devised to his sister M. F., in fee, all the residue of his estate, after payment of debts, and died, leaving the said M. F. and the wives of the plaintiffs, with other brothers and sisters, his heirs at law. Shortly afterwards, the trustees executed a deed to M. F. in which as far as the same might be necessary, they gave their consent and approbation to the said devise, and conveyed the estate to the said M. F. in fee. *Held*, that the power reserved by T. F. was not well executed, and that the plaintiffs were entitled to a share in the house purchased by the trustees, and in the money at interest. *Slifer v. Beates*. ix. 166

POWER OF ATTORNEY.

See EVIDENCE.

1. A power of attorney executed out of the state by a man and his wife, for the conveyance of the wife's land, and acknowledged before a justice of the peace, whose certificate is authenticated under his private seal, confers no authority to make such conveyance. *Sweigart v. Frey, Administrator of Berk*. viii. 299
2. A power of attorney, given by A. and wife to B. "to settle with the executors of C. all accounts, legacies, &c. which by the will of the said C. or otherwise, they might be entitled to receive from his estate; to ask, demand, and receive the

amount thereof, from the said executors; and on receipt thereof, to execute, seal, and deliver, all and every release, quit claim, receipt, or other instrument of writing, which may be necessary to secure the said executors from harm, on account of any payment which may be made by them," does not authorize the attorney to convey the wife's interest in land derived under the will of C.

Ibid.

3. Married women in Pennsylvania may, jointly with their husbands give a power of attorney to convey lands, and, if duly acknowledged, the conveyance under it would be valid. *Fulweiler v. Baugher*. xv. 45
4. Ten years from the date of the power, does not raise a presumption of the death of the principal, at the time when an attorney executes a conveyance under such power, where there is no removal of the principal from his former abode. *Ibid.*
5. An act done by an attorney is valid, if it appears he did it by an attorney, whether it be done in the principal's name or in the attorney's as such. *Ibid.*

POWER TO SELL.

See DEVISE, 25.

PRACTICE.

See ADMINISTRATOR, 8. AFFIDAVIT OF DEFENCE, 1, 2, 3. ARBITRATORS, 5. BILL OF EXCEPTIONS, 14. COURT, 14, 15, 19, 22. EJECTMENT, 27. EVIDENCE, 92, 108. FOREIGN ATTACHMENT, 1, 2, 3. JUDGMENT BY DEFAULT, 1. JURY, 3. PAROL EVIDENCE. PLEADING, 2, 3, 4. QUARTER SESSIONS, 1. REFEREES, 1, 2. RULES OF COURT, 1, 2, 3, 4. SOIRE FACIAS. WRIT OF ERROR.

1. The court may allow the declaration to be amended, after the jury is sworn. *Miles v. O'Hara*. i. 32
2. After *in nullo est erratum*, pleaded and issue joined, it is too late to move to quash the writ, but the court would quash it of their own accord, if injustice were likely to be done. *Downing v. Baldwin*. i. 298
3. Motion to strike off a plea of *alien enemy, puis darrein continuance*, withdrawn at the suggestion of the court, and leave given to withdraw

- the former replication, and reply *de novo*. *Russell v. Skipwith*. i. 310
4. Exceptions to report of referees cannot be received, unless they are accompanied by affidavits as to facts, which do not appear upon the face of the proceedings. *Pearce v. Shaw*. i. 365
 5. An amendment of the declaration may be made at any time during the trial. *Cunningham v. Day*. ii. 1
 6. The plaintiff shall not be permitted to introduce an entirely new cause of action. ii. 1
 7. But provided he adheres to the original cause of action, he may add a count substantially different from the declaration. ii. 1
 8. A declaration may be amended after the jury is sworn, provided it does not change the ground of action, *Smith v. Rutherford*. ii. 358
 9. The court has a right to strike out such parts of a statement made by the defendant, under the act of 21st March, 1806, as are scandalous, impertinent and unnecessary. *Riddle v. Stevens*. ii. 537
 10. Pleas in abatement should not be put in after pleas in bar, unless under special circumstances, of which the court must judge. ii. 537
 11. It is unreasonable to put in a plea in abatement only the day before the trial. ii. 537
 13. There is no occasion for a formal issue, when the cause goes to trial on the statements of the parties. ii. 537
 14. If a statement follows the directions of the act of assembly, it is good, although the plaintiff, in suing on a contract, does not state the performance on his part. ii. 537
 15. In a criminal case, the court will receive a motion in arrest of judgment at any time during the term. *The Commonwealth v. Tilghman*. iv. 127
 16. On a rule to show cause of action, this court will not receive supplementary affidavits. *Eldridge v. Robinson*. iv. 548
 17. Where an attorney appears specially for one defendant in a suit against two, and afterwards as attorney for the defendant, acknowledges judgment in favour of the plaintiff, it is good judgment only as to the defendant, for whom such attorney appeared, and a joint execution is erroneous. *Kimmel v. Kimmel*. 5 294
 18. If a *levari facias*, issued under the 6th section of the act of 1705, "for taking lands in execution for the payment of debts," be returned "not sold for want of buyers," it is unnecessary to issue a *liberari facias*, though such is the language of the act. *Tophser v. Taylor and others*. vi. 173
 19. It is not necessary that the sheriff's return to a *levari facias* should state that he had given the notice required by law of the time and place of sale; nor is it necessary for the party who insists upon the validity of such a sale to prove on the trial, that due notice has been given; unless evidence be given to raise a presumption to the contrary. *Ibid*.
 20. This court will not proceed by attachment, for disobeying an order of restitution on the reversal of a judgment. The practice is to remit the record to the Court of Common Pleas, in order to have the judgment of this court carried into effect. *Russell v. Gray*. vi. 208
 21. Where judgment in ejectment had been entered in the Common Pleas, and possession delivered after the expiration of the term laid in the declaration, this court permitted the term to be enlarged by the defendant in error, on paying the costs of the writ of error. *Riddle, Esq. v. Lessee of Fmdlay and others*. vi. 227
 22. The plaintiff cannot, where there are three defendants on whom process has been served, drop one and proceed against the other two, and if he obtain an award of arbitrators against these two, it is erroneous. *Marshall and others v. Lowry*. vi. 281
 23. Evidence received or rejected at *Nisi Prius* and not noted by the judge, cannot be taken into consideration, on a motion for a new trial, or to take off a nonsuit. *Bee v. Fisher*. vi. 339
 24. If the damages assessed by the jury in the court below, exceed the damages laid in the declaration, this court will not, on the removal of the record by writ of error, suffer a *remittitur* of the surplus damages to be entered; but will, without reversing the judgment, send back the record to the court below to be amended, if they think proper, and if it be returned to this court, amended by a release of the excess of damages, they will affirm the judgment. *Spackman, Administra-*

- 107 of Morris, v. Byers.* vi. 385
25. Trespass against six defendants; two pleaded to issue: and on the same day a rule to plead was entered against the other four, against whom judgment was afterwards signed for want of a plea. The issue between the plaintiff and the two who pleaded was then tried, against whom damages were assessed. Judgment was entered on the verdict, and execution was issued against all the defendants. *Held*, that the judgment, as to all but the two who pleaded, was erroneous, and that the execution was erroneous *in toto*. *Cridland and others v. Floyd.* vi. 412
26. Where, in an action of debt, the verdict does not exceed the sum demanded in the writ, it should be taken in debt for the whole sum; where the debt and interest exceed that sum, it should be in debt for the amount demanded, and in damages for the residue. *Reed v. Pedan and others.* viii. 263
27. Prior to the act of the 28th of March, 1820, it was unnecessary to file a declaration or statement, before submitting a cause to arbitration; but if the plaintiff thought proper to file one, and it set forth no cause of action, he could not recover. *Buck and another v. Nicholas.* viii. 316
28. All courts of record have a right to make rules for the regulation of their practice, not in violation of the law of the land; and they are the most proper judges of the extent and application of their own rules. *Snyder and others v. Baughman and others.* viii. 336
29. A rule requiring exceptions to be filed within a limited time, in all *certioraris* to remove the judgments of justices, applies to the case of a proceeding before two justices, and a jury, under the act, "to enable purchasers at sheriffs and coroner's sales to obtain possession," and is a valid rule. *Ibid.*
30. In Pennsylvania, a conditional verdict in ejectment, is good. *Coolbaugh v. Pierce.* viii. 418
31. Where one of several joint defendants dies, his personal property is discharged from execution; but the judgment remains a lien upon his land; and it seems that the proper mode of rendering the judgment effective in Pennsylvania, is, to issue a *scire facias* against the survivors, and the executors or administrators of him who is dead; and though the terre-tenant is not made a party on the record, he may come in on notice, and defend *pro interesse suo*. *The Commonwealth for the use of Bellas v. Vanderslice and another, Administrators of Miller.* viii. 452
32. A judgment by default, under the act of the 20th of March, 1724, section 1st, is good, where a declaration has been filed, and the defendant has not appeared, though the declaration was not filed five days before the return of the writ. *Morrison v. Wetherell.* viii. 502
33. If the record do not show when the summons was served, the court, on its being made to appear that it was not served ten days before the return day, would set aside a judgment by default for irregularity; but after the execution of a writ of inquiry and judgment upon it, and a long acquiescence, it is not to be presumed that the summons was not regularly served. *Ibid.*
34. The lapse of two years from the return of a *scire facias*, without any proceeding on it, does not by our practice, work a discontinuance; and the plaintiff may afterwards, the proper rules having been entered, take judgment for want of a plea. *Davis v. Jones.* xii. 60
35. Counsel must confine their arguments to the errors they have assigned on the record. *Berry v. Vantries.* xii. 89
36. If there are pleas to an indictment, of *autrefois acquit* and not guilty, the former issue should be first tried. *The Commonwealth v. Demuth et al.* xii. 389
37. If a jury be charged with both these pleas at once, and the verdict is, guilty in manner and form, &c., no judgment can be rendered, as there is no verdict on one of the pleas. *Ibid.*
38. It is the practice to send out with the jury, calculations made by the parties, showing the items on which they rely, in cases where calculation is requisite, in making up the verdict. *The Commonwealth v. Lebo.* xiii. 175

PREFERENCE.

See INSOLVENTS, 1.

PRESCRIPTION.

See PRESUMPTION.

PRESUMPTION.

See ASSUMPSIT, 5. DEPOSITION, 10. EASEMENT, 17. HUSBAND AND WIFE, 20. JUDGMENT, 24. LAND, 4, 7. PAYMENT. SURVEY, 7. TAXES, 5.

1. Where a person has been absent many years without being heard of, and no circumstance appears to account for it, a jury may and ought to presume his death. iii. 490
2. Therefore where 14 years and 9 months had elapsed between the time of a person's being last heard of, who had lived in Philadelphia and the commencement of the action, and when last heard of, he was at a place between which and Philadelphia there was a free communication, and it was then his intent to return to Philadelphia, held, that the jury might and ought to presume his death without issue, and that a legatee over of personal property on such event, might recover without giving security. *Miller v. Beates.* iii. 490
3. Query, If the country has been long enough settled, to allow of the time necessary to prove a prescription. *Strickler v. Todd.* x. 63
4. If there has been an uninterrupted use and enjoyment of a stream of water above 21 years, in any particular way, this affords a conclusive presumption of right in the party so enjoying it. *Ibid.*
5. Under what circumstances it may be left to the jury to presume a conveyance. *Kingston v. Lesley.* x. 383
6. The court will not reverse the judgment because the court below told the jury, that though there was no legal presumption of payment, if it appeared there was a scheme to delay the trial for a great length of time, in order to gain an advantage by the death of parties or witnesses, they could not say but this might raise some presumption against the plaintiff. *Paul v. Durborrow.* xiii. 392
7. Ten years from the date of the power does not raise a presumption of the death of the principal, at the time when an attorney executes a conveyance under such power, where there is no removal of the principal from his former abode. *Fulweiler v. Baugher.* xv. 45

PRINCIPAL.

See BAIL, 6, 7, 8.

PRINCIPAL AND AGENT.

See AGENT, 1, 2, 3. PAROL SALE.

PRINCIPAL AND SURETY.

See BILLS OF EXCHANGE, &c., 5, 6, 7, 8, 9, 10. CONSTABLE, 1.

1. The mere omission by a creditor to bring suit against the principal debtor, does not discharge the surety. *Cope v. Smith and another, surviving Executors of Smith.* viii. 110
2. If a creditor, after being requested to bring suit against the principal debtor, refuse or neglect to do so, the surety is discharged; provided the request be proved clearly and beyond all doubt, and provided it be positive, and accompanied with a declaration, that unless the request be complied with, the surety will be considered as discharged. And although a request, if not in writing, would not be void, it is best that it should be in writing. *Ibid.*
3. Query, Whether the surety would be discharged, if it should appear that the insolvency of the principal would have prevented a recovery of the debt, if suit had been brought against him when required. *Ibid.*
4. If the principal be dead, the creditor is under no obligation to resort to his estate, unless requested by the surety to do so; notwithstanding the 14th section of the act of the 19th of April, 1794, which requires creditors to exhibit their accounts to executors and administrators within twelve months after public notice given. *Ibid.*
5. Where the creditor has the means of satisfaction in his hands, and does not choose to retain it, but suffers it to pass into the hands of the principal, the surety is discharged. And the distinction between principal and surety is not destroyed, by obtaining judgment on the original security. *The Commonwealth, for the use of Bellas, v. Vanderslice and another, Administrators of Miller.* viii. 452
6. An obligee called on by the surety of the obligor to sue the principal loses his resort against the principal by neglect; but evidence is not admissible of a call of that kind made on the administrators of the obligee by the guardian of one of his heirs. *Geddis v. Hawk.* x. 33

PRIVILEGE.

See ARREST, 1.

When another Court has refused to discharge one of its own suitors from arrest on the ground of privilege, this court will not relieve on *habeas corpus*. *The Commonwealth v. Hambright*. iv. 149

PROCESS.

1. Under the act of April 4th, 1785, for erecting and opening a loan office, for the sum of fifty thousand pounds, by which the trustees were authorized, "After default in payment by the mortgagor, to issue their precept to the sheriff of the county where the mortgaged premises shall lie, commanding him to enter upon the messuages, lands, &c. in the deeds of mortgage specified; and by the same to sell on the premises, by public auction or vendue, and convey to the highest bidder, after at least thirty days' public notice given of such sale, by advertising, &c. in some of the most public places of the county," lands had been mortgaged, which then lay in the county of Bedford, but which afterwards on a division of the county, fell into the new county of Huntingdon. *Held*, that the precept to sell should be directed to the sheriff of the county of Huntingdon, and not to the sheriff of the county of Bedford. *Lessee of Cromwell v. McCalmont*. i. 126
2. What errors and defects in process are cured by the act of 21st of February, 1814. *The Commonwealth v. Smith*. ii. 300

PRODUCTION OF PAPERS.

See NOTICE, 7.

PROMISSORY NOTE.

See ASSUMPSIT, 8. BILL OF EXCEPTIONS, 12. BILLS OF EXCHANGE, &c. DEFALCATION, 1. EVIDENCE, 126, 149, 197, 208, 209, 314, 346, 354, 355. EXTINGUISHMENT, 3. NOTARY PUBLIC, 2. OBLIGATION, 1, 2, 3. PAROL EVIDENCE, 10. PARTNERS, 2. RELEASE, 7. SPECIALTY, 1, 2, 3, 4. STATEMENT, 4, 6. TAVERN RECKONING, 1, 2. USURY, 1.

1. Before the act of 27th of February, 1797, the indorsee of a promissory note, held it liable to set-off, and

every species of defence of which the drawer might have availed himself against the payee. That act was intended to place Philadelphia notes, on an equal footing with those in other parts of the commercial world. *Cromwell et al. Executors v. Arrot*. i. 180

2. In an action by the indorsee against the drawer of a note, dated in Philadelphia, payable on demand, without defalcation, it appeared that the payee lived in Philadelphia, and the drawer about 180 miles from it; the first notice the drawer had of the assignment, was fourteen months after the date of the note, previous to which time, he had paid more than half the note to the payee. *Held*, that the jury were at liberty to presume, that the indorsee had notice of the payments, and that the drawer might set them off. i. 180
3. If the drawer of a promissory be known by the indorser, to have been insolvent when the note was made, and when it became due, the indorser is nevertheless, entitled to notice of non-payment by the drawer, a general assignment of his estate and effects, notice is not necessary. *Barton v. Baker*. i. 334
4. A promissory note is legal evidence, if nothing appears on its face to render it void; though it may be void from circumstances *dehors* the note. *Myers v. Irvin*. ii. 368
5. Promissory notes in the nature of bank notes, issued by an unincorporated association, after the act of the 21st of March, 1814, and prior to the act of the 22d of March, 1817, are recoverable in a suit against the members of the association as partners. *Hess v. Werts*. iv. 356
6. Though such notes contain a promise to pay, "out of their joint funds according to their articles of association," yet the members are personally liable. *Ibid*.
7. If the maker of a promissory note is not to be found when the note becomes due, a demand on him of payment is not necessary, in order to charge the indorser. But it is necessary to prove, either a demand, or due diligence, in endeavouring to make a demand. *Duncan v. McCullough*. iv. 480
8. It is not incumbent on the indorser of a promissory note, to show the holder, where the maker is to be found. *Ibid*.
9. Notice to an indorser who lived at

- another place, of non-payment and protest of a promissory note was put into the post office on the 13th, and by the course of the mail could not reach him before the 19th: *held*, that a suit commenced against him on the 16th, was too soon. *Smith v. The Bank of Washington.* v. 318
10. When a promissory note is assigned for a valuable consideration and in the course of business, the assignee cannot be affected by any transactions, between the assignor and the parties to such note, to which the assignee is not privy, and evidence to that effect is not relevant. *Harrisburgh Bank v. Meyer.* vi. 537
11. But such evidence is relevant, if it shows that the assignee was a trustee, or had notice of the transactions, or did not receive the note in the usual course of negotiation. *Ibid.*
12. If the drawer of an indorsed note gives a mortgage bearing the same date as the note, though not executed till some days after, for securing the payment of the note, it does not merge the note or discharge the indorser. *Liggit v. The Bank of Pennsylvania.* vii. 218
13. The reasonableness of notice to an indorser of the non-payment of a promissory note, is a question of fact to be submitted to the jury. No general rule can be laid down by the court on this subject. *Gurly v. the Gettysburgh Bank.* vii. 324
14. A promissory note of which the date has been altered without the consent of the defendant, is thereby rendered void, though in the hands of an innocent indorsee. *Stephens v. Graham.* vii. 505
15. The date is, in point of law, a material part of the note, and, it is error for the court to leave it to the jury, whether the alteration of the date was material or immaterial. *Ibid.*
16. Proof of a note dated the 26th *July*, does not support a declaration stating a note dated on the 25th. *Ibid.*
17. Where a promissory note, payable on demand, was indorsed eight months after its date, it was *held*, that in order to charge the indorser, demand on the drawer, and notice to the indorser, must be proved. *McKinney v. Crawford.* viii. 351
18. A note may, for honest purposes, be dated as of a day antecedent to that on which it was really made. *Richter v. Selin.* viii. 425
19. A promissory note deposited for collection in one of the banks incorporated by the "act regulating Banks" passed the 21st of *March*, 1814, and becoming due, but not drawn payable, at that bank, is not liable to defalcation. *Gray v. Sutton.* viii. 481
20. Payment of a part of a check by the drawer after it becomes due dispenses with the necessity of proving a demand on the bank in a suit against him. *Levy v. Peters.* ix. 125
21. So, *it seems*, would a payment of part before the check becomes due. *Ibid.*
22. The plaintiff cannot by voluntarily giving credit for part payment evade the necessity of proving a demand on the drawee, if the defendant disclaims such credit, and insists on the want of a demand. But if the defendant acquiesces in such credit and insists that the whole has been paid, and relies on length of time and other circumstances to discharge him altogether, he thereby admits a part payment. *Ibid.*
23. In a suit against the maker of a promissory note made payable without defalcation by an indorsee to whom it was passed for a valuable consideration, and in the course of business, evidence cannot be given by the defendant under a plea of payment of a failure of the consideration for which the note was given, though such note be not dated in Philadelphia city or county, nor discounted by a bank, nor deposited in a bank for collection. *Lewis v. Reader.* ix. 193
24. On a guarantee of a promissory note drawn and indorsed by others, if the drawer and indorser are insolvent when the note becomes due this would *prima facie* be evidence that the guarantor was not prejudiced.
25. A bond from a third person, for the money due upon a note is no discharge of the drawer or indorser, *unless it be so agreed*; and proceeding judgment on the bond will not alter the case. *Sterling v. The Marietta and Susquehannah Trading Company.* xi. 179
26. Nor will giving time to the drawer, by forbearing to proceed to the recovery of the money, by legal process; nor the delay to sue the indor-

ser, for several years, operate as a discharge to the indorser; provided no time was given until after the note was protested. *Ibid.*

27. Giving a promissory note for the sum required by the act of assembly of the twenty-second of *February*, 1812, incorporating the President, &c. of the *Susquehannah and Waterford Turnpike Company*, to be paid in money, at the time of subscription, it is not a payment of money within the meaning of the act. *Leighty v. The Susquehannah and Waterford Turnpike Company.* xiv. 434

PROTEST.

See EVIDENCE, 151, 269. NOTARY PUBLIC.

PROTHONOTARY.

See FEES, 15, 16, 18.

1. The court will not presume a rule to have been entered by the prothonotary of his own mere motion. *Shaffer v. Brobst.* xi. 85
2. If such were the case the remedy is by application to the court below, and not by writ of error. *Ibid.*
3. Prothonotaries are responsible for papers allowed by them to be taken out of the office. *Moore v. Porter.* xiii. 100

PUBLIC OFFICERS.

1. Accusations preferred to the governor, against a person in office, are so far of the nature of judicial proceedings, that the accuser is not held to prove the truth of them. It is excused, if they did not originate in malice, and without probable cause. *Gray v. Penland.* ii. 23
2. A public officer is not liable personally on contracts made by him officially, except upon the most clear and satisfactory evidence of an express and unqualified engagement to become so. *Cook v. Irvine.* iii. 492
3. Funds placed by government in such officer's hands, and invested by him in stock but not specially appropriated, do not alter the case. *Ibid.*

PUIS DARREIN CONTINUANCE.

1. If a matter which ought properly to have been pleaded since the last continuance, be given in evidence, without objection, it is not error that it was not pleaded. *Hosteller et al. v. Kauffman.* xi. 146
2. It is a general rule, that a *plea puis darrein continuance* must be put before a continuance has intervened; but the court may, for special rea-

sons, permit it to be put in *nunc pro tunc*, although a continuance has intervened. *Ibid.*

PUNISHMENT.

The punishment of hard labour, &c. may be inflicted on a person convicted of uttering, publishing and passing a bank note of another state, with intent to defraud. *Lewis v. Commonwealth.* ii. 551

PURCHASE MONEY.

See MONEY HAD AND RECEIVED.

TESTATOR, 1.

1. Where *A.* by a deed reciting an original survey and patent, in which the land was described by courses and distances, and was said to contain two hundred acres, and also, reciting several conveyances by which the title was derived to him, granted, bargained, sold, and conveyed, all the said tract of land, without mention of the quantity, and all his right and title thereto, to *B.*, for the entire sum of five hundred pounds, and there turns out to be a deficiency of thirty-two acres, and one hundred and seven perches, in an action for the purchase money, *B.* is not entitled to a deduction for the deficiency, unless there appear to have been fraud or deception in the sale. *Boar v. M'Cormick.* i. 166
2. The owner of land by a derivative title from the warrantee, is not personally liable for the purchase money; it is a charge upon the land. *Case of Keyzey, Executor of Keyzey.* ix. 71
3. The unpaid purchase money, due the commonwealth, on lands taken out by location, warrant, &c. is a charge on the land only, and not a personal charge. *Helfenstine v. Waggoner.* xiii. 207

PURCHASER.

See DEED, 14, 16, 17, 18. INCUMBRANCES, 1, 2. MORTGAGE, 3. NOTICE, 2, 3, 4, 5. SETTLEMENT, SHERIFF'S SALE.

1. *A.* agreed with *B.*, who had a judgment against *C.*, to purchase land at sheriff's sale on that judgment for four hundred and twenty-four pounds, being told by *D.*, that *C.* had a good title. *A.* paid *B.* ninety-five pounds and bid at sheriff's sale one hundred and eighty-five pounds, but never paid any thing more, and got no sheriff's deed, and claimed under an improvement. *D.* after-

- wards purchased the land of another person, who had the title. *Held*, that the title of *D.* would not inure to the use of *A.* without *A's* paying the balance of principal and interest to *B.*, though *D.* encouraged *A.* to buy at sheriff's sale, and asserted that *C.* had a good title, and received part of the money paid to *B.* and was interested in the transaction. *Salmon v. Rance.* iii. 311
2. Nor can *A.* in such case claim part of the land, and reject the rest. If he disaffirms the contract, he is only entitled to a reimbursement of his money and interest. *Ibid.*
3. Where a sale was made of land, under articles of agreement with a person having the legal title, and holding the possession, and the purchaser paid part and took possession and then received notice of an equitable title under an agreement not recorded, in one who had been guilty of negligence, *held*, that the latter could not recover the land without repaying the money paid by such purchaser before receiving notice. *Youst v. Martin.* iii. 423

QUARTER SESSIONS.

1. The Court of Quarter Sessions may on a conviction of fornication and bastardy, require the defendant to give security for the performance of all the sentence, except the fine and costs of prosecution. *Goddard v. Commonwealth.* vi. 282

QUIT RENT.

See WARRANTY, 3. WITNESS, 36.

QUO WARRANTO.

1. An information in the nature of a *quo warranto*, although a *criminal* proceeding in *form*, is in *substance* but a *civil* one; and is therefore not within the prohibition of the 10th section of the 9th article of the constitution of Pennsylvania. *Commonwealth v. Browne.* i. 382
2. Every citizen who pays taxes, has such an interest as will authorize an information in the nature of a *quo warranto*, to be filed at his suggestion, to inquire by what authority the collector exercises his office. i. 382
3. On a trial of an information in nature of a *quo warranto*, in which the issue is on the legality of the election, evidence may be given of conversations on transactions previous to the election, if they were con-

nected with, and might have an influence on it, though no previous notice thereof has been given. *The Commonwealth v. Woelfer.* iii. 29

4. On informations in nature of a *quo warranto* at common law, where there is no relator, the court cannot give judgment, that the defendant shall pay costs; nor have they authority to declare, that any part of the fines shall go to the prosecutors. *The Commonwealth v. Woelfer.* iii. 52
5. An information in the nature of a writ of *quo warranto*, will not be granted, to show by what authority the defendant exercises the office of minister of a religious society, where the party moving for the information, and the defendant, do not claim under the same charter of incorporation.

Query, How it would be, if they did claim under the same charter.

The Commonwealth v. Murray. xi. 73

6. Information in nature of a *quo warranto*, lies against persons acting as trustees of an incorporated church, but the court will grant or refuse it, according to circumstances. *The Commonwealth ex rel. Clements v. Allison.* xv. 127

RAPE.

See INDICTMENT, 44, 45.

RASURE.

1. Where a bond contains a rasure, it is for the jury to decide upon the evidence, whether it is the identical contract declared on or not. But the law views the alteration of such an instrument with a jealous eye, and requires satisfactory evidence to be given by the obligee that the alteration, if in a material part, was made without his consent, that the consent of all the parties in the interest, was also given. *Barrington v. The Bank of Washington.* xiv. 405
2. Where the obligee makes it a part of his case, that the bond in his possession, with the names of all the obligors to it, and afterwards brings suit upon it, omitting one of the obligors whose name appears to have been erased from the bond, it is an admission that the alteration was made with his consent; and it lies upon him to show that it was made with the consent of all the other parties in interest. *Ibid.*

RATIFICATION.

See CONFIRMATION, 1.

REAL ESTATE.

See DEED, 35.

If two tenants in common of land agree in writing that the land shall be sold and the proceeds equally divided, and if either die before the sale, the survivor should sell: on a sale by the survivor, the proceeds are not to be considered as real estate. *Helvestine v. Waggoner.* xiii. 307

RECEIPT.

See AGENT, 1.

RECOGNIZANCE.

See ACTION, 15. APPEAL, 10, 13, 18. BAIL, 3. EVIDENCE, 154. EXECUTION, 22. FEES, 5, 16. RECORD. SCIRE FACIAS, 6, 7, 8, 9, 19. SUPREME COURT. SHERIFF'S BOND, &c.

1. A recognizance to appear on a certain day at the Supreme Court, when on that day no Supreme Court, but a court of *Nisi Prius*, was sitting; held, to be void. *Commonwealth v. Botton.* i. 328
2. A recognizance in which *A.* and *B.* jointly and severally acknowledge themselves to be held and firmly bound unto *C.* in a sum of money, which said sum the said *A.* willeth and granteth to be levied of a tract of land and premises, upon the conditions above mentioned, is binding upon *B.* *Taggart v. Cooper.* i. 497
3. *Query*, Whether if a recognizance for securing a distributive share, is taken by the Orphans' Court, in the name of the president of that court, an action can be maintained on it, in the name of his successor in office? i. 497
4. A recognizance in Dauphin county for the value of lands taken at the appraisement, to the president of the Orphans' Court and his successor in office, is good, such having been the practice. *Kean v. Franklin.* v. 147
5. Such recognizance may be sued in the name of the president of the Court of Common Pleas for the time being. *Ibid.*
6. Such recognizance is a lien on the lands taken at the appraisement from its date. *Ibid.*

7. And such lien is a legal, not an equitable one. *Ibid.*
8. The party taking the lands, and afterwards selling them, may be made a defendant in a suit on such recognizance, though he has since been discharged by an insolvent act, discharging him from all his debts. *Ibid.*
9. Where an alderman has authority to inquire into an offence, and commit the prisoner, hold him to bail, or discharge him, as circumstances may require; he may take a recognizance for his appearance before him, from time to time, pending the examination. *The Commonwealth v. Ross.* vi. 427
10. The condition of such recognizance is not fulfilled by the appearance of the accused, if he abscond during the examination. *Ibid.*
11. The money arising from forfeited recognizances in the county of Philadelphia, entered into to answer a charge of gaming, belongs to the county, and not to the guardians or overseers of the poor of the city, district or township in which the offence may be committed. *The Managers for the relief of the Poor, &c. of the Township of Germantown v. The Commissioners of the County of Philadelphia.* vi. 413
12. In a suit upon a recognizance given by the sheriff and his sureties, for his official good conduct, the judgment is not to be entered for the penalty, for the use of those interested, but for the damages sustained by the party suing. *Wolverton v. The Commonwealth.* vii. 273
13. A recognizance of bail in error, is forfeited if the plaintiff in error *non prossing* the writ by agreement with the other party, provided, there be no fraud or collusion. *Share v. Hunt.* ix. 404
14. But *if seems*, fraud in *non prossing* the writ, cannot be taken advantage of in a suit on the recognizance, under the plea of *nul tiel record*, or payment, but ought to be specially pleaded. *Ibid.*
15. If the recognizance on appeal from a judgment of a justice of the peace, be for payment of the debt, instead of being in the nature of special bail, it is void, and no action lies on recognizance.
16. The entry of security to obtain a stay of execution, under the 21st of *March*, 1806, operates as a discharge of the recognizance in the nature of

- special bail, entered on an appeal from a judgment of a justice of the peace. *Roup v. Waldhouer*. xii. 24
18. If a recognizance, conditioned for the payment of the debt, &c. be entered into after the expiration of the time limited for a stay of execution, and the plaintiff proceed upon it, he cannot afterwards treat it as a nullity. *Ibid*.
18. Where the defendant appeals from an award of arbitrators in favour of the plaintiff, for a sum of money, it is sufficient if the condition of the recognizance be either "that if the plaintiff in the event of the suit, shall obtain a judgment of a sum equal to, or greater than the report of the arbitrators," or that "if the plaintiff in the event of the suit shall obtain a judgment as or more favourable than the report of the arbitrators," the defendant shall pay, &c. without inserting both conditions. *Ayres v. Fisher*. xiv. 112
19. Defendant was surety with P., for land taken by P. at an appraisement for the payment of distributive shares, one of which belonged to the ward of D. D. afterwards took a bond from defendant and P., with a view to release the recognizance, on which bond the present suit was brought. After this suit, D. instituted an action on the recognizance, to recover an amount of interest for which he had taken P's. note, and had judgment, and a levy on the lands, and a return of unsold for want of buyers: *Held*, to be no defence to the present claim, either in whole or in part. *Hildebrand v. Deardorf*. xv. 23
4. Query, Whether a paper filed by one party offering to be bound by certain terms, if the verdict should be in his favour, but not accepted by the other party, can be noticed as part of the record, by a court of error. *Bower v. Blessing*. viii. 243
5. The record of the transcript of a justice's docket entered in the prothonotary's office, is not evidence of the proceedings before the justice, to show a former recovery. *O'Donnel v. Seybert*. xiii. 54
6. A certificate from the prothonotary, annexed to exemplification of a record, "that the paper was truly copied from the records," imports that it is an entire copy, and not a mere extract. *Edmiston v. Schwartz*. xiii. 135
7. On the plea of payment to a *scire facias* on a recognizance, the defendant cannot give evidence to contradict the record of the recognizance. *Patton v. Miller*. xiii. 254
8. On trying the issue of *nul tiel* record, the defendant is not at liberty to give parol evidence, to show that a recognizance purporting to be taken before the prothonotary, was in fact taken before another person. *Ibid*.
9. A certificate from a prothonotary, that a paper is a copy of a record, imports that it contains the whole record. *Voris v. Smith*. xiii. 334
10. Irregularities in judicial proceedings are not to be objected to, collaterally by third persons. *Ibid*.

RECORDING ACT.

See DEED, 25, 26.

1. The certificate of a judge, stating that A. B. appeared before him, and made oath that he saw the grantor sign, seal, execute, and deliver an indenture as his act and deed, without stating that the said A. B. was a subscribing witness, sufficiently complies with the act of assembly of the 18th of March, 1775, to entitle the deed to be recorded, if it appear that the name of A. B. was subscribed as a witness. *Luffborough v. Parker*. xii. 48

RE-ENTRY.

See ENTRY, 2.

REFEREES.

- See AWARD. AGREEMENT, 10, JUSTICE OF THE PEACE, 8.
1. A report of referees, under the act of 1705, is not good, if it be not made by the persons to whom the case was

RECORD.

See COURT, 6. ERROR, 27, 28. EVIDENCE, 9, 82, 176, 224, 322. FORMER RECOVERY, 2. INDICTMENT, 11. INQUISITION, 3. JUDGMENT, 30. SHERIFF'S BOND, &c. 4. WITNESS, 41, 45, 46, 47.

1. It seems, the books of the land office and board of property are records. *Ream v. The Comm.* iii. 207
2. The court will notice the time of the commencement of the suit, as it appears in the record, though it is not stated in the bill of exceptions accompanying the record. *Withers v. Gillespie*. vii. 110
3. The truth of the record of the Orphans' Court, concerning matters within their jurisdiction, cannot be disputed. *Selin v. Snyder*. vii. 166

submitted; and if a judgment has been entered thereon, it will be reversed for error, though no exceptions were filed within the time limited by the rules of the inferior court, for filing exceptions to reports of referees. *Russell v. Gray.* vi. 145

2. On a submission to referees under the act of 1705, it is not necessary to file a declaration, or to state the cause of action in the agreement to refer. *Herman v. Freeman.* viii. 9

REFERENCE.

See ARBITRATION.

1. After a judgment entered on warrant of attorney, the plaintiff and defendants submitted all matters in dispute between them to referees, who made an award, but the submission was not made a rule of court. *Held*, that it was to be considered as a reference, under the act of 1705, and that the court would inquire whether the referees had made a plain mistake in fact or law.
2. In examining reports of referees, the court does not re-examine matters of fact heard and decided by the referees, unless in extraordinary cases; but in the construction of writings and as to the principles of law, the court corrects errors. *Ibid.*
3. If such referees are sworn by attorneys without objection, it is not error. *Ibid.*

REFUSAL.

See DEMAND.

REGISTER OF WILLS.

See EVIDENCE, 113.

The register of wills is not entitled to the fee of two dollars and fifty cents for examining and passing the account of a guardian. *Kline v. Shannon.* vii. 377

REGISTER'S COURT.

1. The Register's Court has no power to cite an administrator to settle his accounts; and consequently no power to issue an attachment for disobeying the citation. *The Commonwealth v. Brady.* iii. 309
2. The Register's Court have a right to revoke letters of administration, granted to a person not entitled to them, and direct to whom new letters shall issue. *Stoever v. Ludwig.* iv. 201
3. A decree of the Register's Court, revoking letters of administration, and directing them to issue to another person, which decree has been

appealed from by the administrator, does not, while the appeal is pending and undetermined in the Supreme Court, suspend his power to proceed in the recovery of debts due to his intestate. *Shauffer v. Stoever.* iv. 202

REGISTRY.

See NEGRO. NEGRO AND MULATTO, 1, 3, 4, 5, 6. SLAVE.

REJOINDER.

See PLEADING, 4.

RELEASE.

See LIEN, 11.

1. If a man devise his real estate to trustees to raise a sum of money, which when raised, they are to put out at interest for the sole and separate use of his daughter, a *feme covert*, who is to receive the interest annually, and whose receipt is to be a discharge, she may release her interest, though no express power of appointment be given in the will. *Newlin's Executors v. Newlin.* i. 275
2. It is not necessary that the wife should be separately examined in such a case, because her interest is personal. i. 275
3. A release to the trustees, executors, and residuary devisees is good. *Ibid.*
4. In Pennsylvania, a mortgage may be released by an instrument not under seal. *Wentz et ux. v. Dehaven's Executors.* i. 312
5. A mortgagee signed in the presence of two witnesses, a paper expressed thus: "This is to certify, that I have a bond and mortgage from A. which I intend to give up to *them*, as I never intend to demand it from *them*, nor any part of the interest due, or to become due at any time." This paper, to which no seal was affixed, he delivered to the mortgagor, who was the husband of his daughter, but kept possession of the bond and mortgage; and died without having demanded either principal or interest, *held*, that this was an absolute and immediate release of the debt, and an advancement to the daughter. i. 312
6. If an assignment be made for the benefit of such creditors as within three months from the date of it, shall execute a release, a creditor who signs the release after the expiration of that period, is bound by

it; though the assignment be declared to be the consideration of the release, and though he can take nothing under the assignment. *Coe v. Hutton.* i. 398

7. If the indorser of a promissory note, before the note becomes due, release to the drawer, all actions, causes of action, and demands, which he then had, or in future might have, against the drawer, by reason of any act, matter, cause, or things prior to the date of the release, he cannot, after the note has been dishonoured, and taken up by him, sustain an action against the drawer, for money paid to his use. i. 398
8. The daughter of the testator took under his will, an estate in fee in a portion of land, to be divided off to her by three persons; after the division she married, and, by a mistake of the scrivener, a release was executed from the other children to the husband alone in fee simple, which purported to be in execution of the will, and contained a covenant on their part, never to claim any right in the land; the wife died without issue: *held*, in ejectment by the releasors, that they were not barred of their right to the land. *Leek v. Cowley.* x. 176
9. Where several distinct parcels of real property are taken at a valuation, by one of the heirs of a decedent, and a recognizance is entered into in the Orphans' Court, to secure the proportions of the other heirs, a release of one of those parcels from the lien of the recognizance, does not operate as a release of the whole. *Reigart v. Ellmaker.* xiv. 121
10. A release by two lessees, will not bar an action against the landlord by a third, unless it appear that the covenant was joint; and this the party alleging that it was, must show. *Eisenhart v. Slaymaker.* xiv. 153

RELEVANCY.

Facts which of themselves can have no legitimate operation upon the issue, cannot be received in evidence, because the jury might possibly infer other facts, which in connexion with them, would support the issue. *Weidler v. The Farmers' Bank of Lancaster.* xi. 134

RELIGIOUS SOCIETY.

See *VOTE.*

RELINQUISHMENT.

See *DEED*, 25. *IMPROVEMENT*, 2.

REMAINDER.

See *DEVISE*, 8.

Query, Whether a common recovery suffered by the tenant for life destroys contingent remainders in Pennsylvania? *Dunwoodie v. Reed.* iii. 435

RENT.

See *ASSUMPSIT*, 5, 6. *DAMAGES*,

1. *ENTRY*, 2. *LANDLORD AND TENANT*, 15, 17. *LEASE*, 3, 4, 3, 6.

1. A tenant from year to year, who has been evicted by title paramount, is not liable for rent from the time of the commencement of the ejectment by which he was ousted. *Bauders v. Fletcher.* xi. 419
2. On a sale by execution, the landlord can be paid his rent only for the last year, and he cannot appropriate money thus procured to any prior year. *Lichtenthaler v. Thompson.* xiii. 158
3. A landlord claiming to be paid his rent out of the proceeds of an execution, is bound to give notice thereof before the execution is returned. *Mitchell's Administrator v. Stewart.* xiii. 295

RENT CHARGE.

See *ANNUITY*, 1. *ENTRY*, 2.

REPEAL.

See *ACT OF ASSEMBLY*, 6.

REPLEVIN.

See *PLEADING*, 11. *SHERIFF*, 6, 26.

1. In replevin, where three defendants avow for rent in arrear, and a fourth makes cognizance, proof of a demise by one, is not sufficient to support the issue. *Ewing v. Vanarsdall.* i. 370
2. A mere servant, who has the care of goods, cannot maintain replevin; but if they are delivered to him by the master as bailee, he may. *Harris v. Smith.* iii. 20
3. In replevin, where the goods are delivered to the plaintiff, and the defendant pleads property and it is found for him, the verdict ought not to be for damages for the value, but a general finding for the defendant, and damages, for the detention, on

which there is judgment *pro retorno habendo*, and for the damages.

Easton v. Worthington. v. 130

4. If there be a verdict in such case for the defendant, finding the value in damages and also interest; the court on error brought, will reverse the judgment entered, and give a correct judgment according to the substance of the finding of the jury.

Ibid.

5. In replevin, for a distress for rent in arrear, the tenant may show that prior to the time when the rent accrued, he purchased the premises with the assent and by the advice of the landlord. *Hill v. Miller.* v. 355

6. But such evidence cannot be given on the issue of nothing in arrear.

Ibid.

7. The plea of nothing in arrear admits the tenancy and puts the defence on matters subsequent. *Ibid.*

8. There is no general issue to an avowry. *Ibid.*

9. In replevin, on the issue of no rent in arrear, a finding by the jury of damages and costs, and a judgment thereon that the defendant have a return of the goods, and recover damages and costs, are regular. *Smith v. Aurand.* x. 92

10. An avowry for rent in arrear, should name for what lands, how much was due, when and by whom due. *Ibid.*

11. Replevin does not lie by one not in the actual, exclusive possession of land, whatever title he may claim, against one who is in the actual, visible notorious occupation and possession thereof, claiming the right, for slates taken out of a quarry on the land. *Brown v. Caldwell.* x. 114

12. On the issue of no rent in arrear, the tenure of the plaintiff cannot be inquired into, nor is the charge of the court, in that respect, material.

In avowry for rent, if there is a general verdict for the defendant for a sum certain, but no finding of the value of the goods distrained, the judgment is a judgment at common law *de retorno habendo*. *Williams v. Smith.* x. 202

13. If the defendant in replevin makes cognizance as bailiff, and states that A. B. held the lands as tenant under a demise at a yearly rent and rent accrued, and plaintiff replies *non demisit* and no arrear, the plaintiff may give previous notice of special matter in evidence, that A. B. took the lands for a certain period, and paid

rent in advance. *Beaumont v. Wood.*

x. 433

14. The action of replevin survives the death of the plaintiff. *Reist, Administrator, v. Heilbrenner.* xi. 131

15. On the issue of no rent in arrear, if the jury find for the defendant in a certain sum, and judgment is entered generally without finding the value of the goods, though it is informal, yet judgment may be entered *pro retorno habendo*, and the remedy of the defendant is to issue that writ, or sue the replevin bond, but execution cannot issue on it. *Weidel v. Roseberry.* xiii. 178

16. A declaration in replevin, describing one of the articles as a lot of sundries, is good after verdict, when the defendant has claimed property, and gone to trial on that plea.

On a verdict for the plaintiff in replevin, on the plea of property, the jury should find the value of the goods, and assess damages for their detention. *Warner v. Aughenbaugh.*

xv. 1

REPLEVIN BOND.

See SHERIFF, 6, 26.

REPLICATION.

See JUDGMENT, 35. LIMITATIONS, 24.

REPORT OF REFEREES.

See PRACTICE, 4.

RESPONDENTIA.

In a *respondentia* bond, in the form generally used in Philadelphia, the payment of the debt and marine interest, depends upon the safe return of the goods, and not on that of the ship. Therefore, if the borrower receives his goods uninjured by another vessel, he is bound to pay. *The Insurance Company of Pennsylvania v. Duval and another.*

viii. 138

RESTITUTION.

1. Where the court reversed a judgment on a *scire facias post annum et diem*, on which the defendant's land was sold, and part of the money paid to the other judgment creditors, and part to the plaintiff; the court refused to award restitution, but ordered the money received by the plaintiff to be brought into court to await their further order; and took no order as to that portion paid to the judgment creditors, as they were

not before the court. *Kirk v. Eaton*,
x. 103

2. The court on reversing a judgment and execution will not suspend the award of restitution, for the purpose of directing an issue to try the merits.

But if land of the defendant has been sold, bound as well by the judgment reversed as by subsequent judgments, the court in awarding restitution of the money levied by the plaintiff, will order it to be brought into court, and paid first to the subsequent judgment creditors and the residue to the defendant. *Ranck v. Becker*.
xiii. 41

3. Assumpsit does not lie to recover money ordered to be restored on reversal of the judgment of an inferior court; though it seems it would if there were a reversal without order of restitution.

An express promise to pay by a stranger, would maintain assumpsit. *Duncan v. Kirkpatrick*.
xiii. 292

RETAILERS.

See LICENSES, 1.

1. The acts of assembly imposing a duty on the retailers of foreign merchandize are not repugnant to the constitution of the United States. *Biddle v. The Commonwealth*.
xiii. 405

2. The provisions in those acts requiring an oath or affirmation from the appellant that he verily believes injustice has been done him, and that his appeal was not made for the purpose of delay, is not in violation of the constitution of Pennsylvania.

Ibid.

REVENUE CUTTER.

Under the act of congress of the 2d of March, 1799, the officers of a revenue cutter are entitled to a proportion of the forfeitures, recovered in consequence of information given by an officer of such cutter, whether such information was obtained, while engaged in the appropriate duties of an officer or otherwise. *Steele v. Bennet*.
iii. 553

REVOCATION.

See MILL.

RIGHT OF WAY.

See AGREEMENT, 8, 9. ESTOPPEL,

3. EVIDENCE, 135.

1. Where land is granted with a right

of way, the right is appurtenant to every part of the land, and the grantee of any part, no matter how small, is entitled to it. *Watson v. Bioren*.
i. 227

2. Query, Whether a man by purchasing lands contiguous to that to which he has a right of way, can extend the right to the lands newly acquired.
i. 227

RIVERS.

See SCHUYLKILL NAVIGATION COMPANY. SCHUYLKILL RIVER.

The rivers of Pennsylvania are not subject to the common law rule, that all fresh water rivers, in which the tide does not ebb and flow, belong to the owners of the soil adjacent, so that the owners of one side have, of common right, the property of the soil, and consequently the right of fishing *unque ad filum medium aquæ*, and the owners of the other side the rights of soil and fishing *ad filum aquæ* on the other side, and that he who owns both sides, is the owner of the whole river, and has the exclusive right of fishing, according to the extent of his shores. *Shrunk v. The Schuylkill Navigation Company*.
xiv. 71

ROADS.

See BRIDGES, 1. VIEWERS.

1. That part of the act of April 6th, 1802, which directed the application for vacating a road to be twice read at the first court, and no further proceedings to be had until the second court, is repealed by the supplement of April 3d, 1809. *Case of Spear's Road*.
i. 142
2. Under the act of the 18th of February, 1813, the draft of so much of the road from Jonestown to Wilkesbarre, as passed through the county of Lebanon, was filed in the office of the clerk of the Quarter Sessions of Dauphin county. *Held*, regular, and that the court of Lebanon county had a right to open the road on a certified copy. *Case of the Road from Jonestown to Wilkesbarre*.
i. 487
3. An authority to commissioners to lay out and make a road, does not enable them to regulate its width. But such power is given by authority, "to open and keep in repair, in the same manner as other roads laid out by the authority of the courts in the counties aforesaid."
i. 487
4. It is not necessary that the jury ap-

- pointed to inquire what damages have been sustained by the owners of property, in consequence of opening a road, should expressly state in their report, that they find no damages for persons whose claims have been laid before them and decided upon. *Case of the Road from Point-no-Point to the Frankford Road.* ii. 277
5. A report stating certain facts and submitting to the court whether, upon such facts damages should be given or not, is bad. ii. 277
6. Where the last thing done by the Court of Quarter Sessions respecting a road, was to quash the report of the re-reviewers, held, that the proceedings were not at an end, and a *certiorari* to move them quashed. *Case of the Road from Bough Street, &c.* ii. 419
7. Where it was not stated in the report of the reviewers of a public road, that they were all sworn, the proceedings were quashed. *Road from Morrison's Lane.* iii. 210
8. Where there is a view and review. the Court of Quarter Sessions may adopt either. *Road from Buckwalter's Orchard.* iii. 236
9. The act of the 26th of March, 1808, respecting roads in Moyamensing, does not repeal or interfere with the general road law of the 6th of April, 1102, as respects that part of Moyamensing township, which is embraced by the act of 1808. *Case of the Road from Fitzwater Street, &c.* iv. 106
10. The court will not quash the proceedings in a road case, because one of the viewers signed the report by a different surname from that by which, through a clerical mistake, he was named in the certificate of appointment. *Ibid.*
11. The Quarter Sessions having confirmed the report, this court will presume that they were satisfied, that the persons who signed it, were the same as those who were appointed. *Ibid.*
12. In common parlance, the word, "street" is equivalent to the word "highway." Therefore if the petition be for a *street*, and the report of the viewers be of a *street*, the proceedings are not vitiated thereby. A substantial compliance with the act is all that is required. *Ibid.*
13. The court will quash the proceedings in a road case, where one of the original petitioners is appointed a reviewer. *Case of the Road from M^cClayburg, &c.* iv. 200
14. Under the 6th and 7th sections of the act of the 29th of September, 1787, a writ of inquiry of damages is not to issue until after the order to open the road is given. *Miffin v. The Commissioners and Inhabitants of Southwark.* v. 69
15. Such an order cannot be presumed unless after a great length of time, and in a case strengthened by other circumstances. *Ibid.*
16. The description of a road prayed for by petition, as beginning at a dwelling-house which is known, and ending at a public road, is sufficiently certain. *Road from Matthew Millers house.* ix. 34
17. A road from the plantation or dwelling-house of a petitioner, to or from the public highway, or any place of public resort, as described in the 17th section of the act of the 6th of April, 1802, is a private road to be laid out, &c. in the manner therein prescribed, and there is no authority in any Court of Quarter Sessions, to have it laid out as a public road. *Ibid.*
18. The 77th section of the act for the improvement of the state, passed the 26th of March, 1821, embraces those cases only in which, by the other sections, there is no special appropriation of the money subscribed by the state to future expenditures. *Commonwealth v. Hanover and Carlisle Turnpike Company.* ix. 59
19. In such appropriations to future expenditures, the state treasurer is bound to pay the money subscribed to the company, and it is no objection to such payment that a contractor objects to it, who claims for work done before the passing of the act. *Ibid.*
20. The report of reviewers vacating an old road and substituting a new one, must be accompanied with a plot or draught of the part vacated as well as the new road substituted, with the courses and distances. *Case of Rutherford's Road.* x. 120
21. It need not appear in the body of the report of review of a road that all the viewers viewed; it is sufficient if it be made to appear to the satisfaction of the court below by deposition. Though it may not appear in the report of reviewers or the draught of the road returned that there were no improvements,

- that fact may be made to appear in the court below by evidence. *Road to M'Call's Ferry.* xiii. 25
22. Under the twenty-sixth and seventy-seventh sections of the act of the 26th of *March*, 1821, for the improvement of the state, when the remaining six miles of the road were finished, the surplus of the fourteen thousand dollars subscribed by the state, that remained after paying the advances of the directors, is to be paid to persons who did work before the passing of the act, in preference to those who worked afterwards in finishing the six miles of the road. *The Commonwealth v. Berks and Dauphin Turnpike Road Company.* xiii. 49
23. It is not necessary, in the return of viewers laying open a road, that the reference to improvements should appear on the draught: it is sufficient, if from the whole report, including the draught, the court receive information of the improvements through which the road passes. *Road from John M'Cord's.* xiii. 83
24. Under the act of the 3d of *April*, 1804, a reference to improvements through which a road passes either in the report of the viewers or the draught annexed, where it appears there are improvements, is essential, and the want of it is a fatal defect. *It seems* if it does not appear to the court that the road passes through improved lands, they will not presume it. *Road from Buttonwood Lane to Green Street.* xiii. 415
25. Re-reviewers are not restricted to a simple approbation or rejection of a road as originally reported, but may return a different one. *Case of a Road in Abington Township.* xiv. 31
26. Re-reviewers are not bound to return a draft of the road which they are directed to re-review, but may return only a draft of that which they themselves recommend. *Ibid.*
27. The Court of Quarter Sessions has no right to make a material alteration in the report of viewers of a road, because it appears that the surveyor has not pursued the directions of the viewers. *Case of a Road from Herr's Mill.* xiv. 204
1. Courts of Common Pleas, who have no express power, by law, to make rules regulating practice, cannot establish a rule in contravention to an act of assembly. *Boas v. Nagle.* iii. 250
2. Great regard is due to the opinion of a court in the construction of its own rules. *Umberger, Executor, v. Zearing.* viii. 168
3. A rule of court, requiring a plaintiff, who has taken the benefit of the insolvent laws, after the institution of his suit, to give security for costs, on pain of suffering a nonsuit, may be properly enforced in cases, the beneficial interest in which would pass to the assignees of the insolvent; but to apply such a rule to a case in which damages are claimed for a personal tort, is erroneous. *M'Farland v. Brown.* xi. 121
4. A rule of court declaring, that all suits pending at the time it was made, if the plaintiff be dead, and his executor or administrator be not substituted within one year from the adoption of the rule, or if the defendant be dead, and process be not issued within that time, to make his or her executor, or administrator a party, in either case, the suits shall abate, is void, not only because its operation is retrospective, but because it is in the nature of an act of limitation, which the court have no power to make. *Reist, Administrator, v. Heilbrenner.* xi. 131

RULES TO PLEAD.

See JUDGMENT, 30.

SABBATH.

1. A conviction for doing worldly business on the sabbath, under the act of the 22d of *April*, 1794, is good, if it follows the form prescribed in the law, though it does not state time when or place where the work was done, or the nature of it. *The Commonwealth v. Wolf.* iii. 48
2. Persons professing the Jewish religion, and others who keep the seventh day as their Sabbath, are liable to the penalty imposed by law for this offence. *Ibid.*

SABBATH BREAKERS.

1. A justice of the peace who has an imperfect view of persons at work on Sunday, cannot forcibly enter the premises of another, for the purpose

RULES OF COURT.

See AFFIDAVIT OF DEFENCE, COURT, 22. PAGE 600, VOL. 6.

of getting a better view, in order to convict the offenders, under the act of assembly of the 22d of April, 1794. *Commonwealth v. Eyre.*

i. 347

SALARY.

See CONSTITUTION, 6.

SALE.

See APPROVED PAPER. DEED.

LIMITATIONS, ACT OF, 8, 9, 10.

MARKET OVERT, 1. NOTICE, 1,

2. PURCHASER. VENDOR AND VENDEE.

1. If the vendor rely on the promise of the vendee to perform the conditions of sale, and deliver the goods to him, the right of property is changed. But where performance and delivery are understood by the parties to be simultaneous, possession obtained by art and deceit will not avail to change the property. *Harris v. Smith.* iii. 20

2. If a wagonner, by whom goods are sent to be delivered to A., sell them openly in the street of a city to B. the sale vests no property in the purchaser. In Pennsylvania there is no market overt. *Lecky v. McDermott.* viii. 500

SALE FOR TAXES.

1. *Query*, Whether the treasurer's deed on a sale of unseated lands for taxes is evidence without first proving, that an assessed tax was due, and that a warrant of sale was issued to the treasurer.

If the purchaser at a treasurer's sale for taxes, has neglected to file a bond for the surplus monies within two years after the sale, the deed to him is void. *Sutton v. Nelson.*

x. 239

SATISFACTION.

See ELECTION, 6.

1. If the plaintiff enter on the docket after suit brought, "ended, and debt and costs paid," it is equivalent to an entry of satisfaction, and may be pleaded in bar of a new suit for the same cause of action. *Philips v. Israel.* x. 391

SCHOOL.

See CORPORATION, 17. EDUCATION, 1.

SCHUYLKILL BRIDGE.

See TAXES, 12.

SCHUYLKILL NAVIGATION COMPANY.

See DAMAGES, 3, 4.

1. The owner of land fronting on the river Schuylkill, above tide waters, who had the exclusive right of drawing seines on his own land, is not entitled to damages under the act of the 8th of March, 1815, incorporating the president, managers, and company of the Schuylkill Navigation Company for an injury sustained in consequence of the erection of a dam across the river by the said company, by reason of which, shad, herring and other fish, were prevented from passing up the river. *Shrunk v. The Schuylkill Navigation Company.* xiv. 71

SCHUYLKILL RIVER.

See SCHUYLKILL NAVIGATION COMPANY.

- By the erection of Fairmount Dam, in the river Schuylkill, a rock just below the dam, which had formerly been private property, and above low water mark, became surrounded at all times by water, and was dry only at low tide, and a few hours before and after: held, that it still remained the property of the former owner, and that it was not common property, where all persons might stand and fish with hoop nets. *The Commonwealth v. Shaw and others.* xiv. 9

SCIRE FACIAS.

See ADMINISTRATOR, 16. ADMINISTRATOR'S BOND, 1. APPEAL, 23. ARBITRATION, 36. BAIL, 3. DOWER, 7. EXECUTION, 3. FOREIGN ATTACHMENT, 1. JUDGMENT, 5, 13, 14, 37. LIEN, 15. PRACTICE.

1. In an ejectment brought to recover lands purchased under a sheriff's sale upon a judgment in a *scire facias* on a mortgage, the terre-tenant cannot give in evidence any matters which might have been shown in the *scire facias* suit, unless there has been fraud or collusion between the mortgagor and mortgagee, or the terre-tenant was not a party to the *scire facias*. *Nace v. Hollenbach.*

i. 540

2. An appeal lies from the judgment of a justice of the peace, upon a *scire facias*. *Guilky v. Gillingham.* iii. 93.

3. In no case and under no circumstances can the merits of the original judgment be inquired into by the defendant, on a *scire facias* upon that judgment, so as to enable him to set up a defence which he might have used in the original writ. *Cardesa v. Humes*, iii. 65
4. No declaration need be filed on a *scire facias*, *Kean v. Franklin*, v. 147
5. Where a judgment is revived by repeated writs of *scire facias*, the plaintiff has a right to charge interest on the aggregate amount of principal and interest due at the time of rendering judgment on each *scire facias*, *Fries v. Watson*, v. 220
6. Where a *scire facias* was brought on a recognizance in the Orphans' Court, against the cognisor and terre-tenants, and the cognisor died before judgment, it was held to be error, to proceed to trial against the terre-tenants alone, where the administratrix, upon being duly served with a *scire facias*, has neglected to come in and be made a party to the record. The proper course is, where the personal representative of the defendant does not appear and take defence, to sign judgments by default *de bonis testatoris*, and the terre-tenants will be permitted to plead and defend, *pro interesse suo*; and on a verdict against him, the judgment will be *de terris*, *Reigart and others v. Ellmaker*, vi. 44
7. Where the cognisor, or his representative, and the terre-tenant appear together, although each must defend for himself, the several issues may be tried together, provided separate verdicts be taken, and the defence of each party kept distinct on the record. *Ibid.*
8. In a *scire facias* against a recognisor and terre-tenant, on a recognizance in the Orphans' Court for lands taken at an appraisement, the plaintiff must first recover judgment against the recognisor, and then proceed to separate judgment against the terre-tenant to have execution of the lands. *Kean v. Ellmaker*, vii. 1
9. It is error if after judgment by default against the recognisor, the jury is sworn as to the recognisor and terre-tenant. *Ibid.*
10. An irregularity in the proceedings in a *scire facias* on a mortgage, viz. that the judgment was entered after the return of one *nihil*, cannot affect the competency of the judgment, or of the sheriff's sale upon it, when offered in evidence in another suit. *Allison v. Rankin*, vii. 269
11. In a *scire facias* against the heir and terre-tenant on a judgment upon the ancestor, judgment entered generally without specifying the lands which it is to affect, is valid under the practice of Pennsylvania, and binds only the lands of the ancestor in the hands of such heir or terre-tenant; and if the plaintiff attempts to enforce it against them personally, the court may interfere in a summary manner. *Coyle v. Reynolds*, vii. 328
12. It is no objection to a verdict on such *scire facias* that the jury did not specify the lands in the hands of the heir or terre-tenant, if they pleaded nothing to bring that point before the jury. *Ibid.*
13. Where judgment has been obtained in a *scire facias* on a mortgage, evidence is not admissible afterwards in an ejectment to show payment of the mortgage debt prior to the judgment. *Blythe v. McClinton*, vii. 341
14. A *scire facias* may issue upon a judgment, though upwards of ten years old, without application to the court, or affidavit. *Lesley v. Nones*, vii. 120
15. The five years within which it is necessary to sue out a *scire facias* to revive a judgment, under the 2d section of the act of the 4th of April, 1798, begin to run, where there is a stay of execution, from the expiration of the period during which the execution was suspended. *Pennock and another v. Hart and another*, viii. 369
17. If a *scire facias* be sued and within the five years, which is returned *tarde venit*, and an *alias scire facias* issue after the expiration of that period, and after a term has intervened, the process may be connected, and the commencement of the proceeding must be referred to the issuing of the original *scire facias*. *Ibid.*
18. A *scire facias* to revive a judgment of a justice of the peace, a transcript of which has been filed in the Court of Common Pleas, agreeably to the 10th section of the act of the 20th of March, 1810, must be issued by the court in which the transcript is filed, and not by the justice

before whom the judgment was obtained. *Brannan v. Kelley*. viii. 479

19. A *scire facias* on the sheriff's official recognizance ought to state, how the plaintiff was damnified, in what action the sheriff violated his duty; a general allegation that the sheriff had not paid over to the parties the sums to them belonging, which have come to his hands, and especially to the party who sues in the name of the commonwealth, is erroneous and bad.

On such recognizance, each suitor who is damnified, may sue a *scire facias*, and recover judgment for the amount in which he is aggrieved. *Withrow v. The Commonwealth*. x. 231

20. The remedy by *scire facias*, given by the defalcation act of 1705, to a defendant, to recover a sum of money due from the plaintiff, is confined to actions in which a debt or damages are demanded by the plaintiff, and does not extend to a case, in which the plaintiff, having brought an ejectment against the defendant, it is agreed that judgment shall be entered for the plaintiff, and that the sum to be paid by the defendant shall be determined by referees, who make a report, finding a certain sum due to the defendant. *Blackburn et al. v. Markle*. xi. 143

21. It seems, that the remedy is by attachment. *Ibid*.

22. The objection that the bond and mortgage were usurious, cannot be taken on the judgment confessed on the warrant. *Lysle v. Williams*. xv. 135

23. A bond and warrant were dated 22d of July, 1818, for the payment of a sum of money in five years from the date: held, that a *scire facias* on the judgment confessed on the warrant, issued on the 22d of July, 1823, was not too soon. *Ibid*.

SEAL.

See CORPORATION, 12.

- A seal made with the flourish of a pen is sufficient. *Long v. Ramsay, Executor of Long*. i. 72

SEAMAN.

See JUSTICE OF THE PEACE, 6.

- If a seaman ship at the port of Philadelphia, and render himself on board, and afterwards desert at Chester, on the voyage down the river, the surety is liable to the forfeiture imposed by the second sec-

tion of the act of congress of the 26th of July, 1790. *Behneke v. King*. ix. 151

SEDUCTION.

See ACTION, 15. TRESPASS, 6.

SENTENCE.

See INDICTMENT, 35.

SERVANT.

See BARKEEPER.

The child of a servant until the age of twenty-eight years, cannot be held to servitude for the same period, and on the same conditions as its mother, who was the daughter of a registered slave. *Miller v. Devil-ling*. xiv. 442

SET-OFF.

See ADMINISTRATOR, 13. EQUITABLE DEFENCE. EQUITABLE SET-OFF. EVIDENCE, 83. 208. LEGACY, 4. PAYMENT WITH LEAVE. PLEADING, 19, 31, 32. PROMISSORY NOTE. WITNESS, 67.

1. In an action for the price of articles sold, the defendant may give in evidence by way of defalcation, a warranty of the articles and breach thereof, without returning the articles, or giving notice to the plaintiff to take them away. *Steigleman v. Jeffries*. i. 477

2. When the cause of action which the defendant wishes to set-off, arises from the same transaction as that on which the plaintiff founds his action, it seems he may have them both decided by the same jury. i. 477

3. In an action for goods sold and delivered, the defendant cannot give in evidence by way of set-off, that certain goods which had been bought by the defendant, and consigned by the vendor to the plaintiff for the defendant, were detained by the plaintiff and consigned by him to other persons. *Gogel v. Jacoby*. v. 117

4. Matters founding in tort arising out of a different transaction, cannot be given in evidence as a set-off, though they may be taken advantage of when they arise out of the same transaction and go to defeat the plaintiff's action. *Ibid*.

5. The notice of set-off must describe the demand intended to be set off with reasonable certainty, and on the trial the defendant cannot give evidence in contradiction to it. *Ibid*.

6. In an action, on a bond entered into

- by the defendant as surety, the defendant cannot give in evidence as a set-off, that land which, prior to the date of the bond, the plaintiff had agreed to sell to him, had been levied on by an execution issued upon a judgment against the plaintiff by one of the plaintiff's creditors subsequently to such agreement to sell. *Brotherton v. Haslet.* v. 334
7. A defendant, under the plea of set-off entered in short, cannot give in evidence matters of set-off, of which on demand of the plaintiff's attorney a specification has been refused, and no notice has been given. *Rogers v. Old.* v. 404
8. *Query.* Whether after a verdict against the defendant as executor, he can on motion, be allowed to set-off against the amount, a debt due to him personally by the plaintiff for which he has obtained judgment. *Wain v. Anthony.* v. 468
9. Where a surviving partner has obtained judgment, being insolvent, and having previously made an assignment, and the state of the partnership account does not appear, the defendant will not be allowed to set off a debt due to him by judgment obtained against the plaintiff personally. *Ibid.*
10. After payment of the partnership debts, the plaintiff's share of the residue is liable to his separate creditors, and might perhaps be subject to such set-off. *Ibid.*
11. Calling on the plaintiff to produce books and papers on the trial, does not authorize the defendant to go into evidence of their contents to prove a set-off without a special notice. *Latimer v. Hodgdon.* v. 514
12. The defendant, in an action on a promissory note, cannot give in evidence as a set-off, a bond given to him by the plaintiff, conditioned for the delivery of a certain quantity of pig-metal to a third person, or order, at any time when called on, without first proving that the delivery of the pig-metal had been demanded. *Leas and another v. Laird.* vi. 129
13. A bond given by the plaintiff to A. for the use of B., (without mentioning assigns,) and transferred by A. to the defendant, cannot be set off in an action on a bond given by the defendant to the plaintiff. *Wolf v. Beales.* vi. 242
14. A. having obtained two verdicts against B., assigned his interest in them to C. B., had some time before obtained a judgment against A., which, among other property, he had assigned to trustees for the payment of his debts. After the assignment of A.'s verdicts, but before judgments had been entered on them, B. received from his trustees a reassignment of the judgment against A. without consideration, and for the purpose of setting it off against the judgments to be entered on A.'s verdicts against him. The court allowed the set-off. *Jacoby v. Guier.* vi. 448
15. If an administrator obtain judgment against a debtor of his intestate, and afterwards the defendant pay a sum of money as security in a bond for the intestate, the defendant may in a *scire facias post annum et diem* on the judgment, avail himself of such payment as an equitable defence. *Dorsheimer v. Bucher.* vii. 9
16. But if the intestate has left assets to pay only in part his specialty creditors, the defendant is entitled to a discount only of the *pro rata* proportion which the estate would have had to pay to the obligee. *Ibid.*
17. A. made an assignment to B. and C. in trust, first, to pay the costs and charges of executing the trust, and then to pay such creditors as should execute a release within sixty days. None of the creditors released within the time prescribed. The assignees afterwards brought an action to recover the price of goods which had belonged to the assignor, and which were sold by themselves to the defendants. Held, that the assignor's note held by one of the defendants could not be set off. *Wilmarth and another v. Mountford and another.* viii. 124
18. Two defendants, sued jointly, may set off a debt due by the plaintiff to one of them. *Childerston v. Hammon.* ix. 68
19. So if the debt be due by one for whom the plaintiff owes as a trustee. *Ibid.*
20. On evidence of set-off offered by the defendant, whether or not the debt on which suit is brought is equitably owned by the defendant's debtor, is a question for the jury to decide; and it is error for the court to decide it and reject the evidence. *Ibid.*
21. A debt due from the plaintiff to a

- co-obligor with the defendant who was not summoned, is not a set-off against the plaintiff's demand on the obligor who is summoned. *Henderson v. Lewis*. ix. 379
22. The separate debt due by the plaintiff to one co-obligor cannot be set-off against a demand against both. *Ibid.*
23. Where an administrator sues for a debt due to himself for goods of the intestate sold by him to the defendant, the defendant cannot set-off a debt due from the intestate to him. *Wolfersberger v. Bucher*. x. 10
24. If a sale of land be made by an executor, under an authority given by will, and the administrator *cum testamento annexo*, after the executor's death, brings ejectment to compel payment of the residue of the purchase money, the vendee cannot in such suit give in evidence by way of set-off or as an equitable defence, that the administrator by means of a mill-dam existing at the time of sale, and ever since had overflowed a valuable portion of the land. *Cornell v. Green*. x. 14
25. The jury cannot, under any plea or notice, find a sum due from the plaintiff to the defendant, to be deducted from another debt due from the defendant to the plaintiff. *Anderson's Executors v. Long*. x. 65
26. Under the plea of set-off, evidence is admissible to show, that since suit brought, the plaintiff acknowledged, that a settlement had taken place after the action was instituted, and that he therefore became indebted to the defendant and gave him a note for the debt, and such a note is also admissible. *Marshall v. Sheridan*. x. 268
27. A defendant who is sued with another, may set-off a debt due to him by the plaintiff, unless there be some superior equity in a third person. *Stewart for the use &c. v. Salaig-nac*. xii. 252
28. In an action brought to recover the price of cattle the defendant may set-off the damages sustained, in consequence of a breach of contract, in not delivering a number of sheep purchased by him of the plaintiff at the same time. *Shaw v. Badger*. xii. 275
29. A set-off can only be of a payment made before suit is brought, but if the plaintiff directs the defendant to make a payment and agrees it shall be a set-off, the courts under their equitable jurisdiction will allow it. *Morrison v. Moreland*. xv. 61
30. A levy by a constable on the defendants goods, for a debt of the plaintiff in which he was bail, removed by the creditor and the goods released, does not constitute a set-off. *Ibid.*
31. Query, Whether a set-off can be given in evidence, under the plea of payment with leave unless there be a rule of court. *Wishart v. Downey et ux*. xv. 77

SET-OFF AND EQUITABLE SET-OFF.

1. A notice of set-off need not be so certain and formal as a declaration. But it must describe the demand with reasonable certainty, so as not to take the plaintiff by surprise. *Lewis, Executrix of Lewis, surviving partner of Long, v. Culbertson, Administrator of Vanlear, for the use, &c.* xi. 48
2. In an action against a surviving partner to recover a partnership debt, the defendant may set off a debt due from the plaintiff to him in his individual capacity. *Ibid.*
3. In an action by the assignee of a bond, the defendant may give in evidence, by way of set-off, articles of agreement between himself and the obligee, for the sale of real estate, by the former to the latter, in which the parties bind themselves in a sum certain, to be paid by the party failing to the party complying with the contract; whether such sum be considered as a penalty, or in the nature of stipulated damages. *Mann v. Dungan, Assignee of Morris*. xi. 75
4. A. obtained a judgment against B. on which an execution issued, which was levied on property belonging to the defendant. Before a sale was made, certain transactions took place between the parties, in consequence of which the execution was suspended; and afterwards, on the application of the defendant, the court below opened the judgment, for the purpose of giving the defendant an opportunity to show what sum ought to be deducted from the judgment, by reason of payments made by him, or claims against the plaintiff which had arisen posterior to the judgment. The parties went to trial upon the plea of payment with leave to give the special matters in evidence. *Held*, that the defendant might prove

- that he had a quantity of leather in the city of Philadelphia, which he proposed to deliver to the plaintiff to be sold by him, and the proceeds of the sale applied to the payment of his judgment; to which proposal the plaintiff acceded; and that this leather, in consequence of the misconduct of the plaintiff, sold for less than its value; and that the defendant might claim an allowance, equal to the real value of the leather. *Harper et al. v. Kean.* xi. 280
5. Where matter has arisen since judgment, which entitles the defendant to a deduction from it, and the judgment is opened for the purpose of giving him an opportunity of showing the amount which ought to be deducted, a verdict finding a balance in favour of the defendant, is erroneous. *Ibid.*

SETTLEMENT.

See ACTUAL SETTLEMENT. DEED, 29. EJECTMENT, 45. IMPROVEMENT, 8. IMPROVEMENT RIGHT. LIMITATIONS, 26, 27, 28, 29. ORDER OF REMOVAL. SLAVE. WARRANT. WARRANT AND SURVEY, 3.

1. Under the act of the 3d of April, 1792, if the time allowed to the warrantee to complete his settlement has expired, the settler may give in evidence his own entry and settlement, without first showing a vacating warrant. *Young v. Beatty.* i. 74
2. Query, Whether a vacating warrant is necessary to protect a settler in such case? But there is no doubt such warrant may issue after the entry of a settler to confirm his title, if not otherwise good. i. 74
3. If a settlement is made with intent to take up a whole vacancy of one hundred and sixty acres, every person entering to improve, against the will of the first settler, is a trespasser. *Gilday v. Watson.* ii. 407
4. An omission by a settler, on taking the benefit of the insolvent acts to return the land in his schedule, is not *ipso facto* an abandonment. ii. 407
5. A settlement right consists in a person's actually residing on the lands with his family, raising grain, &c. *Gilday v. Watson.* v. 267
6. An agreement for division between settlers, never carried into execution

by writing or possession, but where the possession was altogether different, would not be binding on a purchaser for a valuable consideration without notice. *Ibid.*

7. But such agreement is binding between the settlers if fairly made; the fixing vague and uncertain claims before taking out office rights being a sufficient consideration. If the possession be inconsistent with the agreement, it is a fact for the jury to decide whether the agreement was not rescinded by the parties. *Ibid.*
8. A title cannot be acquired by entering and making a settlement upon and procuring a survey of lands for which another person had obtained a warrant and survey under the act of the 3d of April, 1792, but had not complied with the conditions of actual settlement and residence, required by that act, unless such settler had obtained a vacating warrant or filed an application. *Skeen v. Pearce.* vii. 303
9. When the court below charged the jury, that, "if the early settler has in any way defined his claim, he ought not to be deprived of it by a man who settles down upon it many years afterwards," but the jury were probably led by this language, taken in connexion with the circumstances of the case, to suppose, that, as the plaintiff claimed by boundaries embracing six hundred acres, no person had a right to settle within those boundaries, until the plaintiff had laid off the four hundred acres to which he was entitled; or at least if any person did so settle, it was at his own peril, because the plaintiff might afterwards locate his land, so as to deprive him of his improvements, the judgment was reversed by this court for error. *Kissinger v. Thompson.* xii. 44
10. If a settler has not marked the extent of his claim on the ground, a person who intends to take up land near him, should request him to mark his lines; and if without such request a warrantee proceeds to make his survey, he acts at his own peril; and in case of a dispute, it must be decided by the opinion of a jury as to a reasonable location of the settler's tract; regard being had to shape, soil, water, and other circumstances. *Barton v. Glasgo.* xii. 149
11. Whether a right to an island in the *Susquehannah* could be acquired by settlement and improvement in the

- year 1749, *query?* *M'Elear v. Elliott.* xiv. 242
12. If it could, *query*, whether such a title, without warrant or survey, is embraced by the 5th section of the act of the 26th of *March*, 1785, where the settler was in possession at the date of the act. *Ibid.*
13. A deposition proving a settlement and improvement on an island in the *Susquehannah*, by the persons under whom the plaintiff claims, in the year 1749, and a possession continued upwards of fifty years, accompanied by a warrant issued in the year 1760, and a survey returned in the year 1763, for the use of the late proprietaries, is admissible in evidence, against a defendant who shows no title; without having previously given evidence connecting the plaintiff with those by whom the settlement was made. *Ibid.*

SETTLEMENT UNDER THE POOR LAWS.

1. A legal settlement may be gained under the 17th section of the act of the 9th of *March*, 1771, by payment of a county tax only. *Directors of the Poor of Bucks v. Guardians of the Poor of Philadelphia.* v. 417
2. A United States tax is not a public tax, the payment of which gives a right of settlement under the act of 1771. *Directors of Bucks v. Overseers of Columbia.* x. 179

SETTLER.

See IMPROVEMENTS, 9, 10. LIMITATIONS, 15, 16.

SEVERANCE.

The rule that there can be no severance in a personal action, applies to plaintiffs only, and not to defendants. *Gallagher v. Jackson.* i. 492

SHERIFF.

- See ACTION, 21. COUNTY COMMISSIONERS, 1. ERROR, 47. ESCAPE, 1. EXECUTION, 8, 9, 10, 12, 25, 26, 27, 28. FEES, 8, 9. JURY, 5, 14. LIBERARI FACIAS, 2, 4. NEW TRIAL, 11. PROCESS, 1. RECOGNIZANCE.
1. A deed executed by a sheriff cannot be acknowledged by his successor. *Woods v. Lane.* ii. 53
2. One who has been sheriff may acknowledge a deed executed while he was in office. *Ibid.* ii. 53

3. Where sheriff goes out without executing a deed, the proper proceeding is, by an order under the act of the 23d of *March*, 1764.
4. But to warrant such proceeding, the order must be proved to have been made; it will not be presumed where a short period of time has elapsed. *Ibid.* ii. 53
5. A sheriff's officer who is a party on the record as guardian of the plaintiff, cannot execute a writ of replevin; but both he and the minor may accompany another officer in order to show the property. But even if he does act as a sheriff's officer, it will not make the other officer or the minor guilty of a trespass. *Kneass v. Fuller.* ii. 263
6. The sheriff has a right to enter the house of the defendant in a writ of replevin in order to search for goods; and if they are not found there, he is not for that reason a trespasser. *Ibid.* ii. 263
7. A sheriff cannot be compelled to alter his return as to matter of fact; but may on leave given by the court. An order that he should amend was considered as leave given to do so. *Vastine v. Fury.* ii. 426
8. Where a levy on land, is made by virtue of a *fiery facias*, after which an inquisition is held, and the land condemned, and a *venditioni* issued, but countermanded by the plaintiff, who receives the debt and costs of the defendant, the sheriff is entitled to the same commissions as if the land was sold. *Middleton v. Summers.* iii. 549
9. The sheriff is entitled to the fee of three dollars, for summoning the jury, taking the inquisition and making return thereof, but he is not entitled to one dollar and fifty cents more, for making the levy, nor to one dollar and twenty cents for notifying the defendant, of the time and place of the inquisition. *Ibid.*
10. The sheriff may receive fifty cents for each juror, who holds an inquisition on a real estate, but is accountable to him for it. *Ibid.*
11. Under the act of the 24th of *March*, 1812, the sheriff is entitled to a room for his office, in the fire proof buildings, erected by virtue of that act, free of rent. *Commonwealth v. The Commissioners of Philadelphia County.* iii. 601
12. The sheriff is entitled to a fee of one dollar and fifty cents in a prosecution for an offence not capital, in

- which the grand jury have returned the bill ignoramus. *Ibid.*
13. He is not entitled to a fee of twelve and a-half cents for every criminal cause called in court. *Ibid.*
14. Nor to any commission on the sum of four dollars, paid to him for the use of the county, in every verdict in a civil action. *Ibid.*
15. The sheriff is responsible to the county treasurer, for the sum of four dollars, on each verdict in a civil suit, if it is lost through his negligence; but in case of insolvency or loss, without the neglect of the sheriff, he is not responsible. *Ibid.*
16. *Query*, Whether, in case a *venditioni exponas* be issued by the court of one county to the sheriff of another county, the sheriff after sale, may make a valid acknowledgment of his deed before the court of his own county, before the return of the writ. *Scott v. Greenough.* vii. 197
17. The sheriff has a right to demand payment of the purchase money from one who purchases at sheriff's sale, before he tenders a deed acknowledged. *Ibid.*
18. If a purchaser at sheriff's sale accept a deed acknowledged by the sheriff and keep possession of it without objection, he cannot when sued for the purchase money, object that the acknowledgment was defective. *Ibid.*
19. In an action by one as sheriff to recover the purchase money of land sold at sheriff's sale, the return of such sheriff is *prima facie* evidence to prove that the defendant was the purchaser. *Hyskill v. Givin.* vii. 369
20. A levy and sheriff's deed, describing the land as "a tract in the name of A. B. containing three hundred acres more or less," is sufficiently certain in the absence of extrinsic proof. *Ibid.*
21. The sheriff is not the agent of the purchaser at sheriff's sale; therefore notice to the sheriff, is not notice to the purchaser. *Stahle v. Spohn.* viii. 317
22. The sheriff is liable for an escape where he has returned *non est inventus* to a *capias ad satisfaciendum* which had been delivered to him, if prior to the return day, his deputy had the defendant in custody under another *capias ad satisfaciendum* and discharged him; though it do not appear that the sheriff knew of the latter writ, or the deputy of the former. *Wheeler v. Hambright.* ix. 390
23. The return of the sheriff cannot be contradicted by either party in the action in which it is made. *Diller v. Roberts.* xiii. 60
24. A sheriff's return to a *fieri facias* of debt and costs paid, made two years out of time, and not less than a year after suit commenced, in which its effect is material, is not conclusive. *Weidman v. Weitzel.* xiii. 96
25. It is not evidence to show a consent by a plaintiff, that the sheriff should return a *venditioni* against the principal debtor's goods staid, and thereby to discharge the sureties, that the principal and A. went to the plaintiff with part of the money, and returned and informed the sheriff that the principal consented to that return of the writ, and the plaintiff did not complain of it till after the death of A., and afterwards issued an *alias venditioni exponas*. *Commonwealth v. Lebo.* xiii. 175
26. The sheriff is answerable for the sufficiency of sureties in a replevin bond, at the termination of the suit. It is not enough that they were sufficient when they were taken. *Pearce v. Humphreys.* xiv. 23

SHERIFF'S ACCOUNTS.

See INTEREST.

SHERIFF'S DEED.

See TENDER.

Where the sale was made under a *venditioni* from Fayette county, an acknowledgement before the Court of Common Pleas of Westmoreland county, was held not to be good. *Mc Cormick v. Meason.* i. 92

SHERIFF'S BOND AND RECOGNIZANCE.

See SCIRE FACIAS.

1. In a suit on the official bond of a sheriff, the plaintiff is not obliged to prove that the sheriff was afterwards commissioned; such defence arises under the proviso in the act of assembly, and the defendant must plead it. If there are in such suit any breaches assigned in the declaration, on which the plaintiff has no right to recover, the judgment is erroneous, inasmuch as such suit is only for the use of the party suing. *Brownfield v. Commonwealth.* xiii. 236
2. The sureties to the commonwealth,

- in a sheriff's official bond, are liable to an action at the suit of the commonwealth, severally as well as jointly; *Beeson v. The Commonwealth*. xiii. 249
3. In a suit against the surety, on the official recognizance of a sheriff, such sheriff cannot be called by the defendant to contradict his official return to a writ.
- The suit on a sheriff's recognizance must be in the name of the legal party who has the right: an equitable assignee may have his name marked and receive the proceeds of a recovery, but this claim cannot be the subject of litigation in the pleadings. *Brownfield v. The Commonwealth*. xiii. 265
4. The official recognizance entered into by a sheriff and his sureties, is not a record; and *it seems*, the plea of *nul tiel record* is improper to a *scire facias* upon it.
- It seems* such recognizance, as required by the act of assembly is several as well as joint. *Ibid.*
5. The lien of a recognizance entered into by the sheriff and his sureties, is gone, after the lapse of five years, without suit on the recognizance, notwithstanding there has been a suit on the bond given at the same time. *Smith v. Miller*. xiii. 339

SHERIFF'S SALE.

See DECLARATION, 6. ESTATE TAIL, 2. ESTOPPEL, 2. EVIDENCE, 120, 121, 174. EXECUTION, 12. JUDGMENT, 57, 58. JUSTICE OF THE PEACE, 12, 13, 14. MORTGAGE, 12, 13. PRACTICE, 18, 19. PURCHASER, 1. VENDOR AND VENDEE.

1. On a judgment against three, the land was sold by *fi. fa.* to the plaintiff's attorney. The court, on his motion and suggestion of default in payment, set aside the sale, and on an *alias* the land of another of the defendants was sold. *Held*, to be regular. *Pearson v. Morrison*. ii. 20
2. The purchase of lands is not within the trust confided to the plaintiff's attorney; nor is a sale to him, the same as a sale to the plaintiff. ii. 20
3. The plaintiff's attorney who purchases at sheriff's sale, is not entitled to a deed, without paying the money or giving a receipt on behalf of the principal. ii. 20
4. A *certiorari* lies from the Supreme Court, to remove the proceedings of two of the aldermen of the city of Philadelphia, under the act of the 6th of April, 1802. *Lenox v. M'Call*. iii. 95
5. A person in possession, may stay the proceedings of two of the aldermen to deliver possession to a purchaser at sheriff's sale, on making oath that he claims under the defendant, in the execution, by title derived before the judgment and tendering security. *Ibid.*
6. An entry in a private memorandum book, or docket of the sheriff, is not evidence that land was struck off to a particular person at a sheriff's sale. *Salmon v. Rance*. iii. 311
7. A purchaser at sheriff's sale cannot give notice to the person in possession so as to ground a proceeding under the act of the 6th of April, 1802, before the sheriff's deed to him is acknowledged. *Hawk v. Stouch*. v. 157
8. An affidavit by the tenant in possession, that he does not hold possession of the whole premises under the defendant in the execution, is not sufficient to stay proceedings. *Ibid.*
9. The justices are bound to disregard such affidavit, or to call on the tenant to explain what part he held under such defendant or other person. *Ibid.*
10. A purchaser of land at sheriff's sale cannot object to receiving a deed on the ground of a defect of title when the sale was fairly made. *Smith v. Painter*. v. 223
11. *Caveat emptor* applies in all its force to such purchaser. *Ibid.*
12. But *it seems* such purchaser takes the legal estate of the defendant discharged from secret trusts, of which no notice is given till after the acknowledgment of the sheriff's deed. *Ibid.*
13. If a levy and sale are not by fixed boundaries or any ascertained quantity, but of a certain number of acres more or less, in the tenure of A. B., the vendee holds by the extent of such tenure. *Swartz v. Moore*. v. 257
14. Articles of agreement not recorded, cannot affect a subsequent purchaser at sheriff's sale who has not actual notice of them. *Ibid.*
15. A sheriff's sale cannot be objected to by the purchaser, merely on the

- ground of defect of title; it is binding in all cases, except where there is fraud or misdescription of the property in some material respect. *Friedly v. Scheetz*. ix. 156
16. A purchaser cannot object to a sheriff's sale a defect of title of which he had notice; when he has bought after publicly notifying at the sale such defect of title, he cannot give evidence thereof in a suit against him for the purchase money. *Ibid.*
17. If the conditions of sale are that the purchaser shall pay in ten days, and the sheriff's deed shall be delivered at a subsequent day, and if the purchaser refuses to comply, the property will be sold at his risk, and the purchaser gives bond to comply with the conditions of sale, he is liable on the bond without a re-sale. *Ibid.*
18. A sheriff's sale may be set aside where the purchaser may be injured in consequence of a misapprehension of the terms of sale occasioned by the act of the sheriff. *Auwerter v. Mathiot*. ix. 397
19. On a sale of land by prior judgment creditors, a mortgagee is entitled to take the residue of the proceeds of the sale, after paying the judgments, as far as he has prior lien.
- The practice is to apply the proceeds of the sheriff's sale of land, made under an elder judgment, to the payment of all incumbrances, whether by judgment or mortgage. *Lindle v. Neville*. xiii. 227
20. A purchaser of land at sheriff's sale, obtains possession of the land by a proceeding before two justices against the defendant in possession. Another person claiming under a lease, subsequent to the judgment, and no party to this proceeding, takes away the crop; in replevin by the purchaser, such person may show that he held under a title, paramount to the judgment, and that the defendant in possession held by his permission. *Simpton v. Jack*. xiii. 278
- said, "you have sworn a manifest lie," held, actionable. *Kear v. McLaughlin*. ii. 469
2. Where words spoken are actionable, it is proper to admit evidence of the same words being spoken after the action brought, to aggravate damages. ii. 469
3. The words, "What is a woman that makes a libel? She is a dirty creature, and that is you. You have made a libel; and I will prove it with my whole estate," are actionable. *Andrews v. Kopphenhefer*. iii. 253
4. To make words actionable, it seems there should be something of an infamous or disgraceful nature imputed; either a felony or a misdemeanor, which affects one's reputation. *Ibid.*
5. In slander, if actionable words are contained in a count and also other words not actionable, a judgment on such count after verdict for the plaintiff, is good. *Bloom v. Bloom*. v. 391
6. In slander a declaration stating the words to have been spoken by a third person, is not supported by evidence of words spoken to the second person. *McConnell v. McCoy*. vii. 223
7. To say to another, "You got to bed with Sarah M.," is actionable. *Walton v. Singleton*. vii. 449
8. So are the words, "He is such a whoring fellow that it is with difficulty he can keep a girl about the house, being continually a riding them." *Ibid.*
9. So also the words, "He (the plaintiff meaning,) has committed fornication," notwithstanding the declaration avers that the plaintiff was, at the time of uttering the words, a married man. *Ibid.*
10. To say of a man, that he stole a dog, is not actionable. *Findlay v. Bear*. viii. 571
11. It is actionable to say of the plaintiff he moved the line and he made a new line, if they be laid to be spoken in a conversation of and concerning certain bound trees and allowed land marks forming the boundary line, and the evidence of the boundary line between the plantations of the plaintiff and defendant. *Todd v. Rough*. x. 18
12. The words, "You have killed A. B., you have poisoned him, and I can prove it," are actionable, though it appear by the plaintiff's witnesses that at the time when the words were

SHIPPER.

See FREIGHT, 2, 3.

SLANDER.

See COSTS, 17. EVIDENCE, 110. PAROL EVIDENCE, 5. PLEADING, 10, 56. WRIT OF ERROR, 25.

1. A defendant in a suit before a justice, turned towards witness who had just finished his testimony and

- that at the time when the words were

spoken A. B. was alive in a distant part of the country. *Eckart v. Wilson*. x. 44

13. In slander, words subsequent to those laid in the narr, charging a distinct felony, are not admissible in evidence to show malice in the defendant. *Ibid*.

14. A declaration against two, in the usual form of a declaration in slander, except stating the words to be spoken by them by a conspiracy between them had, is still an action of slander, and not of conspiracy; and, being a joint of action of slander against two persons, is bad on writs of error. *Glass v. Stewart*. x. 222

15. A mother cannot maintain an action of slander, for calling her daughter a bastard, there being no *colloquium* of the mother. *Maxwell et al. v. Allison*. xi. 343

16. Of the nature and office of an *inuendo*. *Ibid*.

SLAVE.

See EVIDENCE, 178. NEGROES AND MULATTOES. SERVANTS.

1. A registry of a slave made in Westmoreland county on the 10th of November, 1780, is good under the act of the 13th of April, 1782. *Marchand v. Negro Peggy*. ii. 18

2. Birth in Pennsylvania gives freedom to the child of a slave who had absconded from another state before she became pregnant. *The Commonwealth v. Holloway*. ii. 305

3. A runaway slave from another state, who is charged with fornication and bastardy in this commonwealth, cannot be delivered over to his master, unless security be first given for the maintenance of the child. *The Commonwealth v. Holloway*. iii. 4

4. A hearing before a judge on a *habeas corpus* in the case of a fugitive slave from another state, and the judge's certificate of his absconding, delivered to the master claiming him, in order that he may remove the slave, are conclusive, and a *hominem replegiando* does not lie in such case to try the right of the fugitive to freedom. *Wright v. Deacon*. v. 62

5. A slave who has been so defectively registered, under the act of the 1st of March, 1780, as to be entitled to his freedom, but who has nevertheless continued until an advanced age, a slave *de facto*, has a settlement in the township in which his master resides, which is bound to

maintain him until the master can be compelled to take the burthen on himself. *Overacers of Ferguson v. Overacers of Buffalo*. vi. 103

6. If an owner of slaves in Maryland, lease a farm there with the slaves to cultivate it, the consent of such lessee that one of these slaves should be removed to Pennsylvania, and his being brought here, will not entitle him to freedom to the prejudice of the lessor. *Butler v. Delaplaine*.

vii. 378

7. The sojourning of a master, a citizen of another state, with his slave, in this state at different times, will not entitle such slave to freedom, unless there was at some time a continued retaining of the slave here for six months; unless, perhaps, in case of a fraudulent removal backwards and forwards. *Ibid*.

8. Every slave removed into this state from another without the consent of his master; may be considered as absenting himself, absconding, or clandestinely carried away, under the act of the 1st of March, 1780, and is an escaping under the 2d section of the fourth article of the constitution of the United States. *Ibid*.

9. The owner of *Nell*, a female slave, duly registered, directed by his will that she "be continued with *M*, my well beloved wife, during her widowhood, or natural life: that, if she marry, *Nell* be valued at whatever time is to come of twenty years from this date, and the money arising therefrom to be proportionably divided between *M*. and *W*. if her widowhood or natural life exceed twenty years from this date, then *Nell* is to be free, when either of these takes place, after this term, not before." The plaintiff, (the son of *Nell*,) was born after the testator's death, and within the said twenty years, and while *Nell* was owned and held by the widow, and was registered, and afterwards transferred by the widow to the defendant. The widow married again, in the year the transfer was made. *Held*, that the plaintiff was a free man. *Scott v. Waugh*. xv. 17

10. The act of the 28th of March, 1788, requiring the occupation or profession of a possessor of a slave to be registered, is complied with by registering such possessor as an *esquire*, if he were an associate judge, though he was a farmer. *The Commonwealth v. Vance*. xv. 36

SOLDIER.See **ENLISTMENT**, 1.

The act of congress of the 16th of *March*, 1802, prohibiting the arrest of soldiers for any debt under the sum of twenty dollars contracted before enlistment, or for any debt contracted since enlistment, does not extend to a soldier committed by an alderman for want of security to appear at the Mayor's Court, to answer a charge of having deserted his wife and family, and left them a charge on the guardians of the poor. *The Commonwealth v. The Keeper of the Jail of Philadelphia.* iv. 505

SPECIAL COURT.

Where the presiding judge of a Court of Common Pleas, regularly certifies a case for trial to a special court, on the ground of an alleged interest in himself, and the parties go on to trial without objection to the jurisdiction, this court will not, in a doubtful case, sustain an exception to the jurisdiction of the special court, though it appear from the certificate of the judge that in his own opinion, he had no interest, and though this court should be of opinion that he was not disqualified, on account of interest, from being a witness in the cause. *Barrington v. The Bank of Washington.* xiv. 405

SPECIALTY.

1. The act to incorporate the Farmers and Mechanics' Bank of Philadelphia, does not entitle a note discounted by that Bank to be placed on a footing with a specialty, with respect to the order in which debts due from deceased persons are to be paid by their executors. *The Farmers and Mechanics' Bank v. Greiner.* ii. 114
2. Although in the body of a writing it is said the parties have put their hands and seals, yet it is not a specialty unless it be actually sealed and delivered. *Taylor v. Glaser.* ii. 502
3. But if actually sealed and delivered, it is a specialty, though no mention be made of this in the body of the writing. ii. 502
4. When a paper concluded "in testimony whereof, we have hereunto set our hands and affirmed our seals," and there were two subscribing witnesses over whose names

was written, "sealed and delivered in the presence of," but there was no seal, nor any thing in the place of a seal, opposite the name of the party, but there was a flourish under his name, *held*, not to be a specialty. ii. 502

STATEMENT.See **APPEAL**, 19. **EXECUTOR**, 7.**PLEADING**, 52, 53, 54.

1. A statement under the act of the 21st of *March*, 1806, is not confined to any particular form. It is not error, if it states the cause of action to be founded on an assumption of the defendant, and another who was not summoned, and did not appear. *Purviance v. Dryden.* iii. 402
2. The plaintiff issued a summons in debt, "on a verbal promise and covenant," and filed a statement agreeably to the 5th section of the act of the 21st of *March*, 1806, setting forth a verbal promise, only, for the payment of money. *Held*, that, although the act did not embrace actions founded on technical covenants, yet the word *covenant*, used in this instance, did not vitiate the statement, might be rejected as a surplusage, or understood according to its acceptation among persons unlearned in the law, and construed to mean a *verbal covenant*, which signifies no more than a verbal promise. *Dixon and another, administrators v. Sturgeon and another, surviving executors of Sturgeon.* vi. 25
3. A statement, authorized by the act of the 21st of *March*, 1806, does not require so much nicety and precision of averment as a declaration. It need not aver performance of conditions precedent, because that is implied by bringing suit for money which could not otherwise be demanded. *Boyd v. Gordon.* vi. 53
4. Where the plaintiff, for the price of goods sold, accepted the note of a third person, with an agreement that in a certain event the note shall be returned, and the money paid by the defendant, it was held to be unnecessary in the statement, in an action brought to recover the price of the goods, to say any thing about the agreement relative to the note. If the arrangement has resulted in payment of the price of the goods, it is matter of defence with which the plaintiff has nothing to do until he is called upon to answer it. *Ibid.*

3. If, at the head of an agreement to enter an amicable action with a confession of judgment against C. and B. there is an account by the plaintiff against C. and G., for goods sold, it is a sufficient statement of the cause of action. *Cook and another v. Gilbert.* viii. 567

6. In an action on a promissory note against the administrator of the drawer, a statement filed under the act of the 21st of March, 1806, setting forth a copy of the note, and claiming the principal and interest due upon it, is sufficient, without averring a promise to pay by either the intestate or the defendant. *Bailey v. Bailey.* xiv. 195

STATEMENT ACT.

See PAYMENT WITH LEAVE, 7.

1. The entry of a judgment in York county on the first instead of the third day of the term in a proceeding under the statement law, is cured by the act of the 21st of February, 1822, though a writ of error had issued before the passing of the act. *Underwood v. Lilly.* x. 97

2. In a proceeding on a bond conditioned for the payment of money, under the statement act, judgment may be entered for the penalty. *Ibid.*

3. Under the statement act of the 21st of March, 1806, if the plaintiff does not file his statement till after the third day of the term to which the writ is returnable, he cannot sign judgment by default without calling for a plea or defence.

If the plaintiff omits to file his statement till after the time prescribed by the act, it seems he may still proceed as if he had declared at common law. *Foreman v. McFerrin.* xiii. 290

STATE HOUSE.

See SHERIFF, 11.

Under the act of the 13th of March, 1815, the county commissioners were authorized to repair the rooms of the Supreme and District Courts, and to make repairs in other parts of the state house, necessary to make these rooms safe and convenient, at the expense of the county, notwithstanding by so doing, the expense of repairing the state house exceeded the amount of the rents. *Commonwealth v. The Commissioners.* iii. 551

STAY OF EXECUTION.

See EXECUTION, 22, 23.

STAVES.

The exportation of condemned staves or cullings, to a port in the state of Delaware, is within the prohibition of the act of the 21st of April, 1759, "to prevent the exportation of bad or unmerchantable staves, headings, boards, and lumber." *Shuster, qui tam v. Ash.* xi. 90.

SUMMONS.

See JUDGMENT, 30.

SUMRAL, JOHN.

See FERRY.

SURETY.

See BANKS, 17, 18, 19. BANKRUPT, 1. BOND, 1, 9. CONSTABLE, 1, 2, 3. SET-OFF, 13, 16. SHERIFF, 26. WITNESS, 74, 75, 76.

1. A discharge under the insolvent law of the 26th of March, 1814, of a defendant in prison under a *capias ad satisfaciendum*, does not discharge his surety for a stay of execution. *Sharpe v. Speckenagle.* iii. 463

2. A surety for another on a bond, who gives the obligee a new bond with surety, and a warrant of attorney, on which judgment is entered up, and execution levied, but no money is paid, cannot recover against the principal, in an action on the common money counts for money paid, &c. *Morrison v. Berkey.* vii. 238.

3. Where one, on receiving an assignment of a bond given by two obligors, one of whom was a surety, agreed with the assignor, with the approbation of the obligors, that it should be set off against another bond given by himself to the principal debtor; but instead of doing so, assigned it, before it became due, to a third person, and suffered judgment to go by default against him in a suit brought on his own bond, held, that the responsibility of the surety was discharged. *Reed for the use, &c. v. Garvin et al.* xii. 100

4. It seems, that without any special agreement, the liability of the surety would be discharged in equity, since the creditor had, in his own hands the means of satisfaction, out of the funds of the principal debtor. *Ibid.*

5. Where the surety of the debtor ap-

plies to the creditor, and apprizes him of the legal means of recovering his debt, and he declines to pursue it, whereby the opportunity of its being paid, is lost, the surety is discharged. *Lichtenthaler v. Thompson*. xiii. 157

6. The surety in a bond, a short time before he died, directed his wife to request the obligee to sue out the bond, as he could get the money then of the principal. Five months after the death of the surety, the wife, not being administratrix, communicated this message to the obligee, who offered her the bond to bring suit on, which she refused. *Held*, that these circumstances did not discharge the surety, though, by delay in bringing the suit, the property of the principal was levied on by another judgment creditor, and sold. *Gardner v. Ferree*. xv. 28
7. Sureties are as much bound by the true intent and meaning of the instrument to which they are parties as principals. *Both et al. v. Miller et al.* xv. 100

SURPLUS MONEY.

See *INTESTATE*, 3, 4.

SURRENDER.

See *BAIL*, 7, 8.

SUPREME COURT.

See *JUDGMENT*, 26. *MANDAMUS*, 6.

1. In trespass brought in the Supreme Court, no declaration was filed, and arbitrators awarded two hundred and fifty dollars for the plaintiff: *held*, on proof being made, that before the arbitrators the plaintiff's demand was for damages amounting to one thousand three hundred dollars, this court had jurisdiction. *Bazire v. Barry*. iii. 461
2. The Supreme Court can try no civil issue out of the county of Philadelphia. *Lessee of Willinch v. Morris*. vi. 394
3. The Supreme Court has a concurrent authority with the courts of Common Pleas, to take bail on writs of error. *Smith v. Ramsay et al.* vi. 573
4. A *scire facias* cannot be maintained in the Supreme Court on a recognizance of bail, on a writ of error, though the recognizance be entered into in the Supreme Court. *Ibid.*

SURVEY.

See *CONNECTICUT TITLE*, 3, 4. *EVI-*

DENCE, 10, 11, 13, 36, 140, 143. *EJECTMENT*, 45. *IMPROVEMENT*, 7, 8. *OVERPLUS*. *PATENT*. *WARRANT*. *WARRANT AND SURVEY*.

1. Where a new survey is made calling for the lines of an old survey, there is no occasion to mark the trees anew. *Covert v. Irwin*. iii. 283
2. Although the act of 8th of April, 1785, directs, "that every warrant shall be directed by the surveyor general to the deputy surveyor of some district, in order that the same warrant may be duly executed," yet a survey made under a warrant not directed to the deputy surveyor of any particular district, accepted by the surveyor general, and not in conflict with any other survey, is good evidence of title. The act only deprives the party of his priority of survey, on such warrant. *Reynolds v. Dougherty*. iii. 325
3. After a survey made and returned into office, a second survey without an order of the board of property, is merely void.
4. Such order may grant relief against the fraud or mistake of an officer, provided no new right has attached, but cannot affect an intervening claim. *Ibid.*
5. Great regard is to be paid to the return of a deputy surveyor, and even slight evidence of lines or corners marked will justify a jury in presuming, that the survey was made as returned; but the running of one line only is not sufficient to establish a return of survey. *Fugate v. Coxe*. iv. 293
6. Where the courses and distances expressed in a return of survey, differ from the natural and artificial boundaries on the ground, the latter are to prevail; unless land has been intentionally thrown out, which is a fact for the jury to decide. *Hall v. Powell*. v. 456
7. A survey is not evidence without showing an authority to make it, or proving that such authority existed and was afterwards lost. *Wilson v. Stoner*. ix. 38
8. Possession upwards of thirty years under a survey found in the handwriting of an assistant deputy surveyor, indorsed, "copied for return," with a memorandum by him that there was an authority to make it, the lines of which survey are marked on the ground, is not a sufficient found-

dation to presume a warrant on authority. *Ibid.*

9. Though the rule in general is, that a survey having been once returned, no other survey can be made on the same warrant without a new order, yet if a new survey be made and accepted and warrant issued, it is good, if no third person's claim intervened but that of one who consented to such new survey and encouraged the purchaser to make improvements. *Light v. Woodside.* xii. 23

10. It is a sufficient evidence of an actual survey, to show that any part of it was made on the ground.

11. When a surveyor, in his return, calls for an old line of an adjoining survey, it is not necessary to show that such survey was returned. *Lambourn v. Hartswick.* xiii. 113

12. What parts of the act of the 8th of April, 1785, "providing further regulations, whereby to secure fair and equal proceedings in the land office," are confined to the new purchase, and what parts are co-extensive with the limits of the state.

That part of the 9th section of the act above-mentioned, directing the survey to be made by actually going on the ground and measuring the land, and marking the lines, is directory only, and is satisfied by proofs of marks on the ground, to show the hand of the surveyor, though all the marked lines are not to be found at a distant day, when the survey is returned, the presumption is a violent one, and so ought to be left to the jury, that the survey was regularly made.

Where there is a block of adjoining surveys made for the same concern, and the exterior lines of the whole body are marked, it does not avoid the surveys and returns of each tract, that the division lines are not to be found; but it is necessary to prove this as a fact, by producing the documents of the title to the whole body. *Mock v. Astley.* xiii. 382

13. The owner of a lottery application of the 3d of April, 1769, precisely descriptive and lower in number, has a right to a survey, if obtained within a reasonable time, and mere lapse of time less than three years will not take away this right. *Mau's Lessee v. Montgomery.* xv. 221

SURVEYOR.

See EVIDENCE, 140, 143. WARRANT AND SURVEY.

1. A party cannot be injured by the misconduct of a deputy surveyor. *Lilly v. Paschal's Executors.* ii. 394

2. A deputy surveyor, without a special authority, cannot go beyond the known lines of his district to make a survey. *Lessee of Harris v. Monks.* ii. 557

3. But a survey made by a preceding deputy surveyor on a warrant directed to his predecessor in the same district, may be supported by the uniform practice in such cases. *Ibid.*

4. A survey adopted by the land office, though not made by the regular officer, may be read in evidence. *Ibid.*

5. The 15th section of the act of the 8th of April, 1785, providing that "a deputy surveyor shall not go out of his proper district to make a survey, and every survey made by any deputy surveyor, without his proper district, shall be void and of no effect," does not apply to lands in the old purchase. *Ibid.*

6. *Query*, Whether a special deputation by the surveyor general to make a survey out of the deputy's proper district, is valid? *Ibid.*

7. But a special deputation made by the surveyor general pending a caveat, without the order of the board of property, is unjustifiable. *Ibid.*

SUSQUEHANNAH COMPANY.

See CONNECTICUT CLAIMS, 2.

SWINE.

1. The act of 1705, relating to swine running at large, applies only where they are voluntarily suffered to go at large, not where they escape from the owner without his default; and if the proceedings do not state this, they will be quashed. It is not necessary that proceedings by a justice under this act should contain any adjudication: nor is the appointment of appraisers process, which the constitution requires to be in the name of the commonwealth.

A *certiorari* lies from the Supreme Court to remove the proceedings of a justice under the act of 1705, relative to swine running at large. *Commonwealth v. Fourteen Hogs.* x. 393

TAVERN RECKONING.

1. If a note be given for liquors or a tavern reckoning exceeding twenty shillings, no part of such note is recoverable. *Yundt v. Roberts.* v. 139

2. But if other items of account constitute part of the consideration of the note, it is good as to them, though bad as to the debt for liquors or tavern reckoning when the latter shall exceed twenty shillings. *Ibid.*

TAXES.

See LANDS, 16. QUO WARRANTO, 2. RETAILERS, 1, 2. SETTLEMENT UNDER POOR LAWS. UNSEATED LANDS.

1. A purchaser of lands for arrearages of taxes, under the act of the 3d of April, 1804, is entitled by that third section to the value of his improvements, in all cases, as well where the land is owned by others, as where it is the property of minors and insane persons. *Creigh v. Wilson.* i. 38
2. Land granted by the state of Pennsylvania to an officer of the Pennsylvania line, is not subject, while owned by him, to county or road taxes. *Finney v. Commissioners of Mercer.* i. 62
3. The burgesses, &c. of the borough of Greensburg, in the county of Westmoreland, have no authority to assess and levy a tax on the public property belonging to the county, situate within the limits of the borough. *Piper v. Singer.* iv. 354
4. It seems, that the property of counties is not taxable for city or borough purposes. *Ibid.*
5. If the release required by the act of the 24th of March, 1817, to be made previous to a recovery of money, paid by a purchaser, on a sale for taxes, do not appear to be made to the real owner, but is to the original warrantee, the warrantee will be presumed to be the real owner. *Smith v. Merchand's Executors.* vii. 260
6. The act of the 24th of March, 1817, authorizing the recovery of certain money in the hands of county commissioners, was not an act dissolving a contract without the consent of the parties. *Ibid.*
7. The purchaser of lands sold for taxes, under the act of the 13th of March, 1815, cannot object to any irregularity in the assessment; or the proceedings of the commissioner or treasurer. *Riddle v. The County of Bedford.* vii. 386
8. On a sale for taxes to one person of different tracts of land, held by different persons, the fees are to be paid as for separate deeds on each tract. *Ibid.*

Query, Whether one deed embracing all would be valid. *Ibid.*

9. Taxes due for seated lands are not a lien on real estate, but only a personal charge against the owner or occupant. *Burd v. Ramsey.* ix. 109

10. There is no personal liability for taxes due on unseated lands.

Query, How far lands are to be considered as unseated lands, from which profits were once drawn, but have been afterwards abandoned for a long time by the owner.

If a tax be assessed on seated land in the name of the owner, and the name of the tenant given as matter of description, and in the duplicate the name of the tenant be omitted, the variance is immaterial. *Stokely v. Boner.* x. 254

11. Taxes on real estate cannot be apportioned among the different persons who may become owners of it during the year. The person charged at the beginning of the year is liable for the taxes of the whole year, though he aliene before the day of appeal. *Shaw v. Quinn.* x. 299

12. To support a title under a sale for taxes, by virtue of the act of the 3d of April, 1804, the election returns of the assessors must be produced, or their existence proved and their absence accounted for. The minute book of the commissioners, containing the names of the assessors of a township, accompanied by the oath of the clerk that no election returns or oath of the assessors could be found, is not evidence.

Nor is parol evidence admissible to show who acted as assessor; nor is the warrant for the sale of unseated lands evidence. *Birch v. Fisher.* xiii. 208

13. The Permanent Bridge over the Schuylkill is not taxable under the act of the 11th of April, 1799, for raising county rates and levies. *Schuylkill Bridge v. Frailey.* xiii. 422

14. Sales of unseated lands for taxes, in the counties of Beaver and Butler, under the act of the 26th of February, 1817, are subject to the provisions of the act of the 13th of March, 1815; consequently, the omission of notice, required by the act of 1817, does not vitiate the sale. *Thompson v. Brackenridge.* xiv. 346

15. The purchaser of unseated lands sold for taxes, is bound to pay only the amount of his bid, and not in addition thereto, the prothonotary's

fee for entering the acknowledgment of the deed. The taxes and costs, including the prothonotary's fee, are to be paid to the treasurer, and the surplus bond taken for the balance of the purchase money. *Turk v. McCoy*. xiv. 349

15. Payment of taxes due by the prior owner is a subject of deduction from the purchase money, if a lien; but not payment to a patentee for the use of a hopper boy, &c. to a mill, which were on it when bought, if the patent were void. *Fulweiler v. Baugher*. xv. 45

TENANCY IN COMMON AND JOINT TENANCY.

1. A deed, granting in the *premises* an estate to "A. and B., and to their heirs and assigns," but in the *habendum*, "to the said A. and B., their, and each of their heirs and assigns, to the only proper use and behoof of the said A. and B., *their and each of their heirs and assigns for ever*," passes to the grantees an estate, as tenants in common, and not as joint tenants, independently of the act of the 31st of March, 1812. *Bambaugh v. Bambaugh*. xi. 191
2. That act extends to estates in joint tenancy, which were in existence at the time it was passed, and is not forbidden by the constitution of Pennsylvania. *Ibid.*

TENANCY FROM YEAR TO YEAR.

See EJECTMENT, 54.

TENANTS IN COMMON.

See ASSUMPSIT, 13. DEVISE, 8. ENTRY, 2.

1. If a person purchase, at a sale for taxes, under an agreement that another person should be equally concerned, he would be considered in equity, as holding, for himself and the other, as tenants in common. *Stewart v. Brown*. ii. 461
2. If such person put a tenant into possession, the possession of the tenant is his possession, and the right of another to partition would remain unimpaired. *Ibid.*
3. If, in a deed of bargain and sale, the premises convey an estate "to the grantees, or any of them, their or any of their heirs or assigns," and the *habendum*, "to them, their heirs and assigns, for ever," the grantees hold as tenants in common. *Galbraith v. Galbraith*. iii. 392

4. Devise of a moiety of a tract to be taken off the side nearest the testator's brother, and the other moiety to another: the devisees are tenants in common, and either may support ejectment.

5. When one tenant in common enters on the whole, and takes the profits, and claims the whole exclusively for twenty-one years, the jury ought to presume an actual ouster though none be proved. *Frederick v. Gray*. x. 182

TENDER.

See FRAUD, 4. JUSTICE, 24, 26. VENDOR AND VENDEE, 2, 3, 4, 5, 8, 9.

1. A party who has a right to object to a tender, is not precluded from availing himself of this objection by the circumstance that his motive for objecting was not the tender, but a desire on other grounds to get rid of the contract. *Decamp v. Feay*. v. 323
2. No tender is a substantial one but a legal tender, and the only effect of a tender and refusal where the plaintiff has a direct cause of action is to expose the plaintiff to the loss of the costs, if the defendant pleads the tender, and brings the money into court. *Cornell v. Green*. x. 14
3. It is not necessary, in a suit against a purchaser of land at sheriff's sale brought to recover the purchase money, to aver a tender of a deed acknowledged, unless other conditions are specified, it is a cash sale, and the delivery of the deed is an act subsequent to the payment of the money. *Negley v. Stewart*. x. 207

TENDER OF DEED.

See VENDOR AND VENDEE, 2, 3, 4, 5, 8, 9.

TERRE-TENANTS.

See EVIDENCE, 154. SOIRE FACIAS, 6, 7, 8, 9.

TESTATOR.

The devisee of unpatented land belonging to the testator has no right to call upon the personal estate of the testator to pay the purchase money and fees of patenting the land on taking out a patent. *Case of Kesey, Executor of Kesey*. ix. 71

TIME.

See AGREEMENT, 5, 7.

1. In-computing the twenty days al-

lowed by the arbitration law of the 20th of *March*, 1810, for an appeal, the day on which it is entered, is to be excluded. *Query*, Whether if the last day be Sunday, the appellant has the following day? *Sims v. Hampton.* i. 411

2. In a single bill payable in two months from its date, the months are to be considered as calendar, unless otherwise expressed. *Shapley v. Garey.* vi. 539
3. Months are to be considered calendar in all contracts or transactions between man and man, but *query*, as to judicial proceedings, especially in penal cases. *Ibid.*

TITLE.

See EJECTMENT, 43, 44, 45, 49.

Where both plaintiff and defendant derived title from the same person who had been seised of the premises, it is not necessary that the plaintiff should show a title out of the commonwealth. *Patton v. Goldsborough.* ix. 47

TOWNSHIP.

See INDICTMENT, 17. JUSTICE OF THE PEACE, 17.

1. It is sufficient under the act of the 24th of *March*, 1803, if the commissioners appointed to divide a township return a draft of the new township, or such a description of the division line of the two townships, by natural boundaries, as will mark the dividing line. *Case of Wyalusing Township.* ii. 402
2. It need not appear in the report that the commissioners viewed the ground. That is to be presumed where they return a draft and a favourable opinion. ii. 402
3. A decision of a dispute between two townships, concerning a pauper, is conclusive upon a new township, subsequently created by a division of one of them. *Overseers of Gibson v. Overseers of Nicholson Township.* ii. 422
4. If a Court of Quarter Sessions on a petition for the division of a township, under the act of the 24th of *March*, 1803, make an order appointing three men to make a plot or draft of the said township and the division line proposed to be made, and from their return it does not appear that they made any inquiry into the expediency of granting the prayer of the petition, the proceed-

ings are erroneous. *Case of Macungie Township.* xiv. 67

TREASURER.

See LICENSES, 1.

The 3d section of the act of the 12th of *April*, 1825, requiring each and every county treasurer to settle his accounts before the second Tuesday in *December* in each and every year, is confined to treasurers appointed after the 1st of *January*, 1826. *Commonwealth v. Reigart.* xiv. 216

TREASURER, COUNTY.

See OFFICER.

TREATY.

See ATTAINDER.

TRESPASS.

See ACTION, 3, 4, 13, 30. ASSIGNMENT, 6, 7, 8. CASE, 1. CONSTABLE, 4. COSTS, 18. EJECTMENT, 58. PRACTICE, 25. VARIANCE, 4.

1. The criterion of trespass is force directly applied. Alleging in the declaration that the defendant did not permit the plaintiff to do certain things, does not necessarily imply trespass. *Smith v. Rutherford.* ii. 358
2. A *capias ad satisfaciendum* was issued where the defendant had sufficient real estate to satisfy the debt, and he was arrested and imprisoned. Held, that trespass lies against the party who sued out the *capias ad satisfaciendum*, but that it is a justification to the officer executing it. *Allison v. Rheam.* iii. 139
3. In a trespass with a *continuando* the plaintiff may waive the *continuando*, and prove a trespass before the suit brought. *Haak v. Breidenback.* iii. 204
4. When the defendant has entered the plaintiff's house, and thereby committed a trespass, the plaintiff may bring trespass and lay the debauching his daughter, and leaving her service, as a consequential injury. *Ream v. Rank.* iii. 215
5. *Query*, Whether trespass lies where there is no such entry? *Ibid.*
6. Trespass cannot be maintained by a mother for debauching her daughter, *per quod servitium amisit*, where the seduction was during the life time of the father, with whom the daughter resided at the time;

- although after the father's death, she remained with the mother, who was at the expense of her lying-in, and who supported her and her child. *Logan v. Murray*, vi. 175
7. One in possession may maintain trespass against a wrong doer; and the latter, on the plea of not guilty, cannot shelter himself under the title of a third person; he should specially plead such title, and aver a command or authority from the owner to enter. *Stambaugh v. Hollabaugh*, x. 357
8. If, on a distress for rent, the goods distrained upon are sold without having been appraised and advertised, agreeably to the act of the 21st of March, 1772, the distrainer is a trespasser *ab initio*, and an action of trespass *quare clausum fregit* may be maintained against him. *Kerr v. Sharp*, xiv. 399
9. In trespass *quare clausum fregit*, the omission to declare that the defendant *unlawfully* broke the plaintiff's close, &c. is cured by verdict. *Ibid.*

TRESPASSER.

See LIMITATIONS.

If the proprietor of a surveyed tract, passes over his line and cuts wood on the vacant land of the commonwealth, he not only acquires no title to the vacant land, but is to be considered as a trespasser. If, however, he has enclosed the land, he may defend his possession against an intruder, without right; for where both are trespassers, *potior est conditio defendentis*. *Graham v. Moore*, iv. 467

TRIAL.

It is error if it does not appear by the record of a trial of an indictment, that the defendant was tried by twelve jurors, lawfully sworn. *Dreblor v. The Commonwealth*, iii. 237

TROVER.

See ACTION, 3. AGENT, 4. DAMAGES, 2. PAROL EVIDENCE, 10. WASTE, 2.

1. Trover for stone and gravel dug from land does not lie by one who has the right of possession, against the person who has the actual adverse possession of the land, and sets up title to it. *Mather v. The Ministers of Trinity Church*, iii. 509
2. If the defendant in an action of trover die during the suit, the action dies with him, and his executor or

administrator cannot be substituted, in his place, under the act of the 13th of April, 1791. *Hench et ux. Administrators, v. Metzger and another, Executors*, vi. 272

3. It seems, however, that in an extraordinary case, in which there was originally no other remedy than trover, the action must not die with the person. *Ibid.*
4. If one having goods in his possession, belonging to the estate of an insolvent, alleging that he has a lien on them for a debt due to him by the insolvent, it is sufficient evidence of a conversion to support an action of trover. *Jacoby and others v. Lausatt*, vi. 300
5. In such a case the standard of damages is the current price of such goods at the time of demand; and the jury may give further damages in the nature of interest. *Ibid.*
6. Trover lies against the manager of a nail factory, belonging to third persons, for refusing to deliver a machine, put up in the factory during the period of his management, by the patentee, who afterwards sold it to the plaintiff; there being no evidence, that the refusal was in pursuance of instructions from his employers. *Berry v. Vantries*, xii. 89

TRUST.

See ASSIGNMENT, 3. EVIDENCE, 98. SHERIFF'S SALE.

1. Where executors were authorized by will to sell land, devised to testator's family, on giving security, and they sold the land, and employed the identical money it produced in buying other land, and there was evidence of declarations by one of the executors, tending to show that the purchase was in trust for the family. *Held*, that the circumstances were sufficient to raise a trust for the family in the lands thus purchased. *Wallace v. Duffield*, ii. 521
2. Trusts are not strictly within the statute of limitations, but equity has adopted the principles of the statute. *Ibid.*
3. The *bona fide* purchaser of the legal title, is not affected by a secret trust, of which he has not direct, express, and positive notice. The possession of a *cestui que trust*, and the exercise by him of every act of ownership, is not such notice. *Scott v. Gallagher*, xiv. 323

TRUSTEE.

See EJECTMENT, 69. EQUITABLE TITLE. EVI NCE, 94. INSOLVENT LAWS, 5. LIMITATIONS, 9. WITNESS, 26.

1. A person who obtains a patent for land to which he is not entitled, is the trustee of him who has the right. *Duer v. Boyd.* i. 203

2. An action does not lie by a creditor against trustees under a domestic attachment, until they have been called before the court, which appointed them, to settle their accounts. *Wilhelm v. Miley.* v. 137

3. Sales by trustees to near relations are suspicious.

Under what circumstances trustees are charged with the principal or interest of property sold by them. *Lamberton v. Smith.* xiii. 309

4. Extent of the remedy of *cestui que trust* against trustees in Pennsylvania, in assumpsit for money had and received. *Reese v. Ruth.* xiii. 434

TRUST FUND.

See DEVISE, 20, 21.

TURNPIKE.

See BRIDGES. CORPORATION, 23. MANDAMUS, 4, 5. ROADS, 18, 19.

A turnpike road cannot be levied on by an execution issued upon a judgment obtained against the company.

Some remedy, in the nature of a sequestration, to take the nett profits, after providing for the repair and maintenance of the road, would be properly a subject of legislative provision.

Other real estate of the company may be taken on execution: but, if it be blended with the road in one levy, so that it is difficult to separate them, the court will quash the whole proceedings. *Ammant v. New Alexandria and Pittsburg Turnpike Company.* xiii. 211

VACATING WARRANT.

1. In an ejectment for land west of the river Allegheny, claimed by the plaintiff under a warrant and survey, without settlement, the defendant has a right to show that the legal title has been granted to him by the commonwealth, without having shown that he had taken out a vacating warrant, agreeably to the act of

the 3d of April, 1792. *Riddle v. Albert.* xiv. 341

2. Query, Whether a vacating warrant be essential, where it appears that when the settler was about to make his settlement, he was assured, upon inquiry of the deputy surveyor of the county, that there had been no prior appropriation of the land. *Ibid.*

VACANT LAND.

See ACT OF ASSEMBLY, 9, 10.

VARIANCE.

See ERROR, 96. PLEADING, 7, 8.

1. Though the entry of an amicable action state the plaintiffs to be assignees of A., yet, if the narr and bond are of an assignment to the plaintiffs by B., it cannot be taken advantage of on trial. If the variance is material, there must be a demurrer. *Latimer v. Hodgdon.* v. 514

2. Where the writ states the plaintiff to be executor of A., who, was surviving obligee with B., it is no variance; though the statement describe the bond as given to A. and B. executors of C., and the bond is in that form. *Crotzer v. Russel.* ix. 78

3. Afteroyer, and pleas of performance and payment to an administration bond and verdict, it is too late to object to a variance between the bond and the form prescribed by the act of assembly, nor are unsubstantial variances material at any stage of pleading. *Carl v. The Commonwealth.* ix. 63

4. Though the writ be in trespass *quare clausum fregit*, and cutting down and carrying away trees and the narr only for cutting down and carrying away trees on plaintiff's ground, the variance cannot be taken advantage of in error, after verdict and judgment.

The title to the soil cannot come directly in question on such a declaration. *Weidman v. Kohr.* xiii. 17

VENDITIONI EXPONAS.

See ERROR, 2. INQUISITION, 1. SHERIFF, 16. SHERIFF'S DEED, 1.

The sheriff may advertise a sale on a *venditioni* before the return day, and adjourn and finish it after the return day. *McCormick v. Meason.* i. 92

VENDOR AND VENDEE.

See AGENT, 5. AGREEMENT, 5, 6,

7. DECLARATION, 7. DEED, 17, 18, 19. EJECTMENT, 50. EVIDENCE, 111. INCUMBRANCES, 1. JUDGMENT, 34. MORTGAGE, 2, 12. PLEADING, 44. SHERIFF'S SALE, 7, 10, 11, 12, 13, 14, 15, 16, 17. TRUSTEE, 3, 4.
1. Where goods are sold at public auction on a credit, and the vendee afterwards refuses to take them, the owner may, before the expiration of the credit, maintain an action in his own name against the vendee for a breach of contract; in which the measure of damage generally is, the difference between the price agreed to be paid for the goods, and their value when the vendee refused to take them. This may be ascertained by a re-sale, at the risk of the vendee; but the jury are not bound by this mode of estimation, if they can find another more agreeable to truth. *Girard v. Taggart.* v. 19. 539
 2. A purchaser who has accepted a conveyance with special warranty only, but has not paid his money, may defend himself in a suit for the purchase money, on the ground of a defect in title, when he has no covenants on which he may have recourse, though there has been no eviction. *Hart v. The Executors of Porter.* v. 201
 3. Query, At what time, and in what manner he may have his remedy where there are such covenants. *Ibid.*
 4. It is of no consequence as respects a third person, whether a purchaser paid the consideration money in the lifetime of the vendor or afterwards, or when he paid it; his being bound to pay what he contracted for, makes him a purchaser for a valuable consideration. *Gilday v. Watson.* v. 267
 5. A. conveyed to B. twenty-five acres of land, part of a large tract, in consideration of three hundred and fifty pounds, and at the same time B. gave A. a bond for the payment thereof the next day, and also permitting A. to sell the twenty-five acres, if he sold the residue, A. agreeing to allow B. the advance of price on the same, for which he might sell the whole. A. retained possession, and afterwards entered into articles of agreement with C. to sell the whole, in consideration of money and land, and eventually gave C. a deed for the whole. B's. deed was not recorded till after the agreement, but C. had then notice of it. *Held*, that B. had no right to sell on those terms, that part of the consideration money should be paid in land: but, that B. could not recover the twenty-five acres from C., until B. tendered all the purchase money due on the bond. *Brindle v. M'Ilvaine.* vii. 345
 6. If before the day for accepting a deed under a contract of sale, the vendee deny that he had made the purchase, and makes no other objection, that dispenses with the necessity of the tender of the deed by the vendor on the day. *Hampton v. Speckenagle.* ix. 212
 7. But though before the day the vendee deny, that he had made the purchase, yet, if the land is subject to incumbrances not declared at the time of sale, the vendor must satisfy the jury beyond a doubt, that he could and would have removed the incumbrances, or he is not entitled to damages. *Ibid.*
 8. If there are articles of agreement for the sale of lands, in which no time is stipulated for delivery of possession, but before the day of payment of the purchase money the vendee obtained possession by the consent of the vendor, and the purchase money not being paid the vendor obtains possession unlawfully by the act of a third person, the vendee may recover in ejectment without tendering the purchase money or bringing it into court. *Harris v. Bell.* x. 39
 9. A sale of the land of an intestate on a judgment an executor *de son tort* is void. But to raise an equity in the purchaser under the judgment, evidence is admissible in ejectment for the land, to show the judgment for the land, to show the judgment and execution, and sale; that the purchaser took possession, and paid money, and made improvements, and that some of the children and heirs of the intestate stood by at the sale, and urged its being made: and also, that another of the children contracted to sell the land to the purchaser. *Nass v. Vanswearingen.* x. 144
 10. In an action of debt for the penalty in articles of agreement, the plaintiff may recover damages for a breach of the contract; and it is error to instruct the jury, that he must recover the whole of the purchase money, or nothing. *Huber v. Burke.* xi. 238

11. The vendee of land by articles of agreement, provided he has performed all the covenants which he has agreed to perform, may recover the purchase money in an action of debt, for the penalty in the articles, although the contract has not been in part executed by the delivery of possession to the vendee; after which the vendee is entitled to the land. *Ibid.*
12. Such an action is like a bill in equity, and the defendant may, under the plea of payment, give in evidence every circumstance which would influence a chancellor, on a bill for a specific performance. *Ibid.*
13. The penalty is merely a security for damages for a breach of contract; and the verdict is to be taken in debt for the whole penalty; but the sum actually to be recovered, is to be assessed as damages, on payment of which the judgment for the penalty is to be released. *Ibid.*
14. The vendor, if he seeks to recover the purchase money, should count specifically for it, on the covenant to pay; setting out the covenant, performance on his part, and failure on the part of the vendee, and concluding in the usual form. *Ibid.*
15. But he is not entitled to recover the whole purchase money, where there are incumbrances not removed when the suit is brought. He must be in a condition to tender a good title, before the commencement of the suit, notwithstanding the vendee has refused to accept a deed. *Ibid.*
16. If the vendor, after the execution of the articles, mortgage the premises, it is so far an acquiescence in the determination of the vendee to rescind the contract, as to preclude him from demanding specific execution of it; though he may, perhaps, be entitled to damages for the loss of the bargain. *Ibid.*
17. Where, in a contract for the sale of land, the vendee agrees to pay part of the purchase money on the delivery of the deed, and the residue in instalments, and the vendor stipulates to procure, within twelve months, a good and sufficient title, derived from the commonwealth; and on such title being produced, the vendee agrees to execute a mortgage on the premises, and give his bond with warrant of attorney, &c. to secure the payments aforesaid; in an action by the vendee against the vendor or his securities, for not procuring a good and sufficient title, the plaintiff must aver in his declaration, that he was ready to perform his part of the agreement. *Grace v. Regal.* xi. 351
18. If by the correspondence and course of dealing, between a merchant in the city, and another in the country, the former is authorized to send goods to the latter without special order, the property of goods so vests in the latter, from the delivery to the carrier. *Morberger v. Hackenberg.* xiii. 26
19. Agreement on the 28th of November, 1811, by F., to convey all his plantation in L. township, adjoining lands of D. B. and others, reference being had to several deeds of conveyance to F., will show the metes and bounds; the whole tract contains two hundred and twenty-five acres, and allowance, two hundred and one acres the said F. has a patent deed for, and the remaining twenty-four he will get a patent deed for. In April, 1812, a conveyance was made of two hundred and twenty-five acres, more or less, and the hand money paid, and bonds given for the residue. In 1823, the vendee discovered by actual measurement, that the patented tract fell short twenty acres, and ninety perches. *Held*, that he is not entitled to any deduction, in a suit on one of the bonds, for this deficiency.
- Parol evidence is admissible in such case, in behalf of the defendant, to show that at the time the deed was executed the vendor declared to the vendee, that he had a good title to two hundred and twenty-five acres, and would warrant that quantity of land. *Frederick v. Campbell.* xiii. 136
20. Where a sale of land is by the acre, the right of ascertaining the quantity of a survey exists, whether reserved or not, and if no time be limited, it may be done at any time before the business is closed.
- But where articles of agreement are carried into execution, by conveyance and bond from the vendee, there, in general, the contract is considered as closed; unless in extreme cases, showing misapprehension or fraud. *Bailey v. Snyder.* xiii. 160
21. If a defendant, at the time of the sale of his lands by the sheriff, represent to the purchaser that cer-

tain land is included in the levy, the land passes in equity to the purchaser, though it was not actually included in the levy, provided the purchaser was acting innocently.

After a sheriff's deed to such purchaser, the defendant is not entitled to call on him to give up the sale, on the ground that part of the land sold was not included in the levy, though he tender sufficient to cover his expenses. *Buchanan v. Moore.* xiii. 305

22. Where both the vendor and vendee of land know of the existence of incumbrances, and all the circumstances attending them, and the vendee takes from the vendor a deed, warranting particularly against those incumbrances, and gives his bond for the purchase money, it is no defence to an action on the bond, that the incumbrances are still existing. *Fuhrman v. Loudon.* xiii. 386

VENIRE FACIAS DE NOVO.

See ERROR.

VERDICT.

See AMENDMENT, 10, 15. DEBT,

5. DECLARATION, 5, 6, 8, 9, 10.

EJECTMENT, 35. EVIDENCE, 27,

52. IMPROVEMENTS, 9, 10. IN-

DICTIONMENT, 5. JOFILLS, 1, 2.

PLEADING, 10, 15. PRACTICE,

30. REPLEVIN, 3, 4. SLANDER,

5. TRESPASS, 9.

1. In an action for freight and damage, a verdict in these words, "we find for the plaintiff, and are of opinion, that the plaintiff has already received out of property of the defendant, payment in full for the amount of freight to which he is entitled;" set aside for uncertainty. *Diehl and others v. Evans.* i. 367

2. Several verdicts having passed in favour of a party and the other party's accepting a lease of him, and promising to give no more trouble, are not conclusive against the latter. *Richardson v. Lessee of Stewart.* ii. 84

3. Juries have no power to alter the contract between the parties, or to substitute one substantially different. A verdict so formed is void. *Witman v. Ely.* iv. 260

4. On principles of equity in this state, the jury may find damages conditionally, prescribing the terms on which they shall be released

but it is not competent to the court to instruct the jury to find damages sufficient to insure a specific execution of a contract, and that the court would control the plaintiff in the use of the verdict. *Decamp v. Feay.* v. 323

5. If the jury, in addition to their verdict, find matter merely superfluous, such finding does not affect the verdict. *Cavene and another v. M' Michael.* viii. 441

6. The verdict recorded in court is the only proper verdict: the passage verdict returned by the jury is not evidence, nor is it to be filed or preserved. *Dornick v. Reichenbach.* x. 84

7. A narr stating a cause of action, though informally drawn, is cured by verdict. *Morrison v. Moreland.* xv. 61

VIEWERS.

See JURORS, 2.

1. Under the 1st section of the act of the 3d of April, 1804, the twelve viewers must be sworn: if only ten of the twelve appointed by the court are sworn, and proceed to act, their proceedings are irregular. *Case of Broad Street continued.* vii. 444

2. If twelve are appointed and sworn, two who do not view have a right to be present, and give their opinions at the deliberations which afterwards take place. *Ibid.*

UNITED STATES PRIORITY.

See JUDGMENT, 39.

UNSEATED LANDS.

See LANDS, 15, 16. TAXES, 13, 14.

1. If the precept from the county commissioners to the county treasurer, for the sale of unseated lands on which taxes have been assessed, and remain unpaid under the acts of the 11th of April, 1799, 3d of April, 1804, and the 4th of April, 1809, do not describe the land ordered to be sold, it confers no authority on the treasurer to sell it. *Stewart and others v. Graffies and others.* viii. 344

2. The five years limited by the third section of the act of the 3d of April, 1804, for the institution of a suit for the recovery of land sold for taxes under that act, are to be computed from the time the purchaser enters into possession, and not from the time of sale. *Waln v. Shearman and others.* viii. 357

3. If a tract of unseated land descends to several heirs, some of whom sell their interest, and there is a tenant in possession under some of the vendees, no part of the land can be sold as unseated.
4. A sale of part of a tract of unseated land for taxes, under the act of assembly of the 13th of April, 1804, by the mere description of so many acres, would be void for uncertainty: but if it be of so many acres on a particular side or to be taken out of a particular portion, it might be made good by a subsequent survey. *Erwin v. Helm.* xiii. 151

VOTE OR VOTING.

1. To entitle a citizen, otherwise qualified, to vote for electors of a president and vice president of the United States, it is necessary that he should within two years next preceding the election, have paid a state or county tax, which shall have been assessed upon him individually at least six months before the election. *Catlin v. Smith.* ii. 267

2. Where the original charter of a religious congregation conferred the right to vote on the "contributing members, being communicants," and, by a subsequent act of assembly, confirming the charter, with some alterations, it was declared, that no person should be entitled to vote who was under the age of eighteen years; it was held, that, to entitle a member of the corporation to vote, it was not necessary that he should have taken the sacrament after the age of eighteen years. *Weckerly v. Geyer.* xi. 35

3. If evidence of the practice at other elections of the congregation has been admitted without objection, it is not error for the court to instruct the jury, that such evidence is admissible to show the true construction of the charter of the church. *Ibid.*

4. The formation of a society distinct from the rest of the congregation, for the instruction of a portion of it in the doctrine of the same church in another language, is not *per se*, a separation from the original congregation; though such society have a minister and officers of its own. It is a circumstance for the consideration of the jury; the question, whether a man has separated himself so as to cease to be a member of a

corporation, often depending on a variety of circumstances, proper for their consideration. It is, therefore, error to charge the jury that the inspectors of an election have no right to exercise a sound discretion, in deciding whether such a separation has taken place, and that a vote could not be refused unless the party offering it had been regularly proceeded against, and disfranchised in the manner pointed out by certain church regulations. *Ibid.*

5. Malice is an ingredient, without which an action cannot be sustained against an inspector of an election for refusing a vote. By malice is meant, the refusal of a vote from improper motives, and contrary to the inspector's own opinion. The existence of malice may be inferred from circumstances. *Ibid.*

USAGE.

1. Evidence of usage or custom, fixing the construction of the words, "inevitable dangers of the river," in a bill of lading for the transportation of goods by inland navigation, is admissible. *Gordon and Walker v. Little.* viii. 533
2. A usage or custom, varying the liability of common carriers by water, from that of the common law, may be proved. *Ibid.*

USE AND OCCUPATION.

See ASSUMPSIT, 5, 6.

A defendant is liable in assumpsit for use and occupation, who has accepted a parol lease of a house for a year, and undertaken to the landlord to procure possession from a former lessee, notwithstanding he afterwards refuses to take possession, alleging, that he rented for another person. *M'Gunnagle v. Thornton.* x. 251

USURIOUS CONTRACT.

A mortgage given to secure a usurious contract, is not void, but the mortgagee is entitled to recover the amount actually loaned, with legal interest. *Turner v. Calvert.* xii. 46

USURY.

See SCIRE FACIAS, 24.

E. and N. were partners in the erection and business of a steam mill, on terms of dividing the profits and bearing equally the expense. Soon after the mill was in operation, they agreed by writing that N. should

take all the profits, pay the debts (except a debt due by the firm to E.) and pay E. eight thousand five hundred dollars for his interest in the property, when it should be convenient: and, in the mean time, pay him a yearly rent of six hundred and forty dollars, and that any part of the purchase money, which should be paid, should abate the rent *pro tanto*. N. to release all demands against E., and E. to convey the steam mill immediately. *Held*, that the contract was usurious. *Evans v. Negley*. xiii. 218

WAGES.

1. The master has no lien on the ship for his wages, unless it be so expressly agreed. *Fisher v. Willing and another*. viii. 118
2. A mortgagee of a ship at sea does not, merely by delivery of the documents, acquire such a possession, as to be liable to the master for wages accruing after the date of the mortgage. *Ibid*.

WAIVER.

See APPEAL, 26, 37. BILL OF EXCEPTIONS, 12, 13. ERROR, 111, 88. FORFEITURE, 2. MORTGAGE, 3.

WARRANT.

See DESCENT, 1. EQUITABLE TITLE. ESTATE, 2. EVIDENCE, 95, 96. IMPROVEMENT, 1, 7, 8. MILITIA, 15, 16. SURVEY, 2, 6. WARRANT AND SURVEY, 5, 6, 11, 12, 13, 14, 15, 16, 17.

1. A descriptive warrant, on which a survey and patent are afterwards duly obtained, vests the possession of vacant land in the owner of such warrant, so that on obtaining his patent, he may maintain trespass for acts done on the land after the date of the warrant, and before the patent. *Bechtel v. Rhoads*. iii. 334
2. There is no act of assembly which declares that a warrant vests no title to the land it describes, unless a survey be made thereon, within seven years from its date. *Deal v. McCormick*. iii. 343
3. A warrant dated in 1763, and totally abandoned until 1812, may give no right; but it may give a perfect right if it has been followed up in a reasonable time by a survey which has been destroyed without

the fault of the warrantee; or it may give a right even without a survey, if it describe the land with reasonable certainty, and the warrantee has taken possession under it, designated the boundaries in such a manner as to be well known to the neighbours, and retained a continued possession until the time of his survey in 1812. *Graham v. Moore*. iv. 467

4. A warrant issued since the act of the 22d of September, 1794, for land on which grain has been raised, but no settlement made with a view to residence, and the support of a family is illegal, and vests no title. *Bryan v. Flickinger*. iv. 501
5. If, however, an improvement be begun, and grain raised in contemplation of following it up by residence, and this design be persevered in according to law, the title will relate to the commencement of the improvement. *Ibid*.
6. Where one has taken out a warrant which is illegal and void, under the act of the 22d of September, 1794, and requires that a warrant shall be founded on a previous settlement, he may, nevertheless, afterwards acquire a title by improvement to the land described in the warrant. *Smith v. Oliver*. xi. 257

WARRANT AND SURVEY.

See ACTUAL SETTLEMENT. APPLICATION, 1, 2. EQUITY, 1. ERROR, 16, 109, 110. ESTATE, 1. EVIDENCE, 95, 96, 140, 143, 368, 369, 370. IMPROVEMENT RIGHT, 1, 2. LANDS, 11, 12. LIMITATIONS, 3, 8, 12. SURVEY. 8. WARRANT.

1. When a survey is returned by the proper officer, the presumption is in favour of an actual survey having been made; and it lies on the opposite party to disprove it. *Renn v. Contributors to Pennsylvania Hospital*. ii. 413
2. A survey, consisting of six sides, on three of which there is no mention of course or distance, and by which the quantity of land does not appear is evidence. *McClemens v. Graham*. ii. 460
3. After a warrantee has had a survey made and marked upon the ground, he has fully exercised his rights as to the land to be appropriated, and the customary permission to locate his grant again, can never be allow-

- ed to the prejudice of third persons. If, therefore, a warrantee, after having made a survey on the ground on a descriptive warrant, protract the lines of the survey on paper, so as to include land which was not embraced by the lines marked upon the ground, his title to the land thus taken in, relates only to the return of survey, because it is founded on a new contract, to which the assent of the commonwealth is not given until that time, and if a title be previously acquired under the commonwealth, by one who had no notice of the protraction of the lines of the first survey, it will not be affected by it. *Diggs v. Downing.* iv. 348
4. A survey thus protracted and remaining in the hands of the deputy surveyor, is no notice that the protraction on paper is different from the lines marked upon the ground. *Ibid.*
5. A. took out a warrant in trust for B., on which a survey was made in the following year, on land which had been previously improved, and which answered the calls of the warrant. The survey was never returned, but B. and those who claimed under her, constantly resided on the land. Fourteen years afterwards a second survey was made by virtue of the same warrant on other land, which also answered the calls of the warrant. This survey was not returned, nor were surveying fees paid, nor was any improvement made on, or possession taken of the premises. *Held*, that the survey was void, and would not prevail against a fair settler, although he had actual notice of it, before he began his settlement. *Smith v. Fultz.* iv. 473
6. Where a deputy surveyor, in surveying a body of lands, merely ran the exterior line without running and marking the intermediate lines of the tracts, as the act of assembly requires, *held*, that he was not entitled to recover upon a *quantum meruit* for his services. *McDowell v. Ingersol.* v. 101
7. A usage set up by deputy surveyors from motives of convenience to themselves, of running only the exterior lines of the survey of a large body of lands, is not binding on their employers, where it is not shown that the latter knew of the usage at the time. *Ibid.*
8. After a survey made and returned, the lines cannot be altered by the deputy surveyor to the injury of a third person on the ground of mistake in such survey; and evidence of a diagram afterwards made by authority of the deputy surveyor, and approved by him, and returned to the surveyor general's office, who directed a survey, which was suspended by suit, is not admissible after a lapse of time to show mistake in the original survey in excluding some lands and including others. *Healy v. Moul.* v. 181
9. Returns of surveys by an agent for the deputy surveyor, are *prima facie* evidence that such surveys were made by the authority of the deputy, notwithstanding the fees are in one instance charged by the surveyor general to the deputy, and in another, to the agent; and whether such authority was given in the case, is a fact for the jury to determine. *Philips v. Shaffer.* v. 215
10. The actual lines marked on the ground, are the true lines of survey. *Ibid.*
11. If K. enters a *caveat* against the acceptance of the whole of W's. survey, on the ground that it contains more land than he is entitled to, and afterwards obtains a warrant, calling for W's. land, as a boundary, this is no acknowledgment of W's. title to all the land embraced by his survey. *White and another v. Lessee of Kyle.* vi. 107
12. The practice which prevailed prior to the year 1767, of making a survey of a much larger quantity of land than was called for by a warrant, and the usual allowance of ten per cent. was binding on the proprietaries; and the board of property had no right to reject a survey, merely because it contained more than the warrant called for, and allowance, or to cut off the surplus beyond that quantity, and grant it to another. *Ibid.*
13. On a loose warrant or application, even where it is so vague, that it cannot be referred to any particular part of the state, the title vests at the time a survey on it is made on the ground. It is only in the case of a shifted location, that the commencement of the title is postponed until the acceptance of the survey. *Moore v. Shaver.* vi. 130
14. In the case of a shifted warrant, actual notice is necessary but, if the

warrant might, or might not have been laid on the ground, constructive notice is sufficient. *Ibid.*

15. An unreturned survey of six hundred and ninety-five acres of land within the purchase of 1768, upon a warrant for three hundred and sixty acres, dated in 1790, to include an improvement made in 1775, cannot be supported against a subsequent warrant, survey and possession. Such a survey, however, is not void in *toto*, and the assistant deputy surveyor cannot survey and cut off what part he pleases, on another warrant, without the consent and knowledge of the owner of the first survey; particularly if it be done fraudulently and with a view to the promotion of his own interest. *Blair v. M'Kee, and another.* vi. 193
16. It is the duty of the deputy surveyor, in such case, to make a special return to the board of property; but his omission to do so will not prevent the owner of the original survey from recovering in ejectment as much land as by law he is entitled to, which the jury may ascertain, and a diagram of which may accompany the verdict. *Ibid.*
18. Where an improvement is called for in a warrant, and there is an established settlement, the boundaries of which are fixed by adjoining surveys and consentible lines, a survey may be legally made of four hundred acres, and ten per cent. allowance, though the warrant be for a smaller quantity of land. *Ibid.*
19. *It seems*, that a survey which has been returned and accepted, will not be bound down to four hundred acres and allowance, where there is no intervening right. *Ibid.*
20. Land on which no settlement had been made, might have been taken up under one of the warrants known by the name of *David Meade's* warrants issued on the 5th of *April*, 1802. *Chesnut v. Scudder.* vii. 103
21. Surveys made in *April*, 1777, by an agent for the person who had been the deputy surveyor under the proprietary, are void, and give no title against an intervening survey. They might have acquired validity under the acts of *March*, 1780, or the 5th of *April*, 1782, but if the provisions of these acts were not conformed to, they are not valid. The acts of the 9th of *April*, 1781, and 4th of *September*, 1793, do not
- reach the case. *Hubley v. Van-horne.* vii. 185
22. A void survey is no notice to a person procuring a subsequent survey. *Ibid.*
23. Where a warrant is not precisely descriptive, but only to a common intent, the title attaches only from actual survey. *Ibid.*
24. A survey, of which only one line is run, and marked on the ground, is not good to show that the defendant had intruded within the lines of the plaintiff's lands. *Morris v. Travis.* vii. 220
25. *It seems*, a survey of which only one line is run and marked on the ground, is void; but though only one line is found, it may go to the jury as evidence to presume others marked, and if accompanied with possession and acts of ownership for twenty-one years, may form a title. *Ibid.*
26. So, if a general marked outline enclose several tracts, it is a good survey of the whole: and the intermediate lines established for division or sale, may be good though not marked on the ground. *Ibid.*
27. A survey made by a person not appearing to be a deputy surveyor of land, not comprehended within the act of the 8th of *April*, 1785, returned into office and accepted, and a patent issued thereon, is valid. *Creek v. Moon.* vii. 330
28. An order of the board of property and proceedings thereon, for a re-survey of a warrant, noting the interference with another survey on which seven hundred and fifty-five acres were surveyed on a four hundred and twenty acres warrant, is *prima facie* evidence against a person claiming under the latter, though the order was made without notice to such party. *Simfison v. Wray.* vii. 336
29. A survey of seven hundred and fifty acres on a warrant for four hundred and twenty, ought to be inquired into by the board of property, and the bare acceptance without patent, where the party had notice of an adverse claim, is not sufficient to vest title to the injury of such claim. *Ibid.*
30. It is against conscience to take out a warrant for land, knowing that another person has paid for the same land and obtained a warrant which covers it; and where the warrant is descriptive, there is no

- ground for supposing the warrantee intended to relinquish it, because he has neglected to have a survey made. *McCullough v. Wallace and another, Executors.* viii. 181
31. Where the board of property, at the request of the owner of an application and survey, issued an order of re-survey, for the purpose of ascertaining how far the tract was interfered with by other surveys belonging to the same individual, and the deputy surveyor, either by mistake or design, left out a small portion of it, it was held, that the original owner was not postponed in favour of one, who, soon after the mistake was made, applied for a warrant to the same land, and five years afterwards obtained a patent, although the re-survey was returned to the land-office in rather more than six months after it was made, and no objection appeared to have been made, either to the re-survey, or to the adverse survey and patent. *Bryson v. Howser.* viii. 409
32. A location calling for land "on the north side of Blacklick creek," is not to be considered as a shifted location, merely because it is surveyed on land which does not bound on the creek.
- If a person pay the fees for a survey on an indescriptive location, and it is made, but fraudulently returned by the deputy surveyor for another person, it is to be considered as returned for the holder of such location, and his title is good against a *bona fide* purchaser, if he has not been guilty of laches, or acquiesced in the other's right. *Boyles v. Kelley.* x. 214
33. When a warrant calls for an improvement, without saying when that improvement commenced, the title under such warrant cannot be carried farther back than its date.
- An application for an improvement, mentioning the year when it began, is good, though it does not state the day or month when it commenced.
- Whether a right of pre-emption founded on improvement is lost by laches, is a matter for the jury, where its determination depends on a variety of facts.
- A recovery cannot be had in ejectment, of lands on the west side of the Allegheny river, without a survey: but on the east side of the river, one who has a right of pre-emption, and has designated his boundaries, may recover without a survey. *Mickle v. Lucas.* x. 293
34. An application, calling for an improvement, is descriptive to a common intent; and if due diligence be used in obtaining a survey, the title attaches from its date, and not from the return of survey; unless some subsequent act of the holder, such as suffering another to take possession and make improvements without notice of survey, postpones him. *McDowell v. Young.* xii. 115
35. It is the duty of the deputy surveyor to return his surveys; and if he neglects this duty, the holder of an application is not to be injured by it. *Ibid.*
36. The holder of a surreptitious warrant for four hundred acres on which a survey of eight hundred acres has been made, but not returned, cannot hold the land against an application founded on a settlement, where the applicant had a survey made of a smaller quantity than his application called for, by a deputy surveyor, then interested in the surreptitious warrant, if, as soon as he discovers the fraud, he applies for an order of re-survey, and that order is executed, though not returned. *Ibid.*
37. Time does not begin to run against the holder of such an application, where there has been no *bona fide* purchaser, until he has had notice of the fraud. *Ibid.*
38. The holder of such surreptitious warrant, whose alienee and descendants hold more than the four hundred acres, cannot be considered in the light of a person claiming under a settlement right, and therefore protected on the ground of a settlement made without notice of re-survey, or before such re-survey is returned. *Ibid.*
39. Where two warrants to different persons are surveyed together, and a general diagram of surveys returned, without a division line, or any thing to designate each tract, the grantees are not tenants in common of the whole. Their rights, as between themselves, are suspended until the subject of the grant to each shall be specifically designated by the proper officer, or by themselves; and when that is done, the title of each relates to the commencement of the grant, and each may recover for himself. *Ross v. McKunkin.* xiv. 364

40. After a warrant has been executed, but before a return, a new survey may be made on vacant lands, without a new authority; provided the warrantee agrees to accept it, and it does not interfere with the intervening rights of third persons. *Vickroy v. Skelley*. xiv. 372

WARRANT OF SEIZURE.

See DOMESTIC ATTACHMENT, 1, 2.

The court cannot, under a warrant of seizure against a husband for the maintenance of his wife and children, order the sale of stock held by the wife as administratrix. *Guardians of the Poor v. Roberts*. v. 112

WARRANTY.

See COLLATERAL WARRANTY. COVENANT, 1, 2, 3. EVIDENCE, 135, 174. JUDGMENT, 3. SET-OFF, 1. WITNESS, 4.

1. A. purchased land at sheriff's sale as the property of B., B. being in possession, A. conveyed the land to C. with a covenant of special warranty against himself and those claiming under him, and gave a bond, conditioned that he would deliver peaceable possession of the premises to C. or his heirs at a certain date, and warrant and for ever defend them against the present possessor B., and all and every person attempting to hinder the said C., or his assigns from taking possession thereof so as aforesaid, and against the said H. and his heirs or assigns. A. recovered possession by ejectment and delivered the possession to C., who was afterwards ejected by a person claiming under B. Held, that the condition of the bond was not broken. *Miller v. Keller*. vii. 32

2. Collateral parol promises made by the vendor on the execution of articles, or of a deed to indemnify the vendee against incumbrances, and cannot be taken advantage of in a suit for the purchase money, where they are not alleged as proofs of fraud. It follows that any special damage sustained in consequence of the non-performance of such promises, is not evidence in such suit. *Share v. Anderson*. vii. 43

3. A quit rent out of land sold, against which there is a covenant of warranty in the deed, is not to be estimated and deducted from the purchase money, but only the arrearages.

4. An assertion by the vendor to the vendee, at the time of selling a mare, that he is sure she is safe and kind, and gentle in harness, amounts merely to a representation and does not constitute a warranty, or express promise that she is so. *Jackson v. Wetherill*. vii. 480

WASTE.

1. An action on the case, in the nature of waste, cannot be maintained against a tenant for cutting and carrying away the trunks of trees blown down by a tempest, whether the lessor be the owner of the inheritance or otherwise. *Shult v. Barker*. xii. 272

2. It seems, that the proper remedy is an action of trover and conversion. *Ibid*.

WATER COURSE.

See DEED, 30. MILLS.

WATER RIGHT.

See DEED, 16.

WAY GOING CROP.

See LANDLORD AND TENANT, 1, 2.

WESTERN UNIVERSITY.

The act of the 18th of February, 1819, vested in the trustees of the Western University of Pennsylvania, the title to forty acres of vacant land belonging to the commonwealth, adjoining the out lots of the town of Allegheny, subject to the right of common pasture, given by the act of the 11th of September, 1787, to the inhabitants of the said town. *Trustees of the Western University v. Robinson*. xii. 29

WHARVES AND LANDING.

See WOOD, 1, 2.

WIDOW.

See ELECTION, 7. FORMER RECORD, 2. LEGACY, 21.

WILLS.

See DEVISE, 10, 11, 13, 31, &c. EVIDENCE, 29, 54, 55, 79, 104, 112, 113, 144, 158, 159, 160, 161, 162, 213, 214, 216, 217, 218, 219, 220, 221, 222, 223, 224, 257. LEGACY. ORPHANS' COURT, 8. PARTITION, 4. POWERS, 1.

1. A testator executes a will in due

- form, in the presence of witnesses. Afterwards he sells part of his real estate and purchases other real property. Several years after, he draws up a paper, headed "Memorandum of the last will," &c., by which he makes a different disposition of his estate, and appoints executors. This paper he shows to a third person, and requests him to put it in form. Some apparent inconsistencies are pointed out, and the testator is advised to apply to counsel. He says he will do so; but survives the conversation five months, during which he is of sound mind and capable of doing business, and then dies without having made any alteration in the paper, and having in his possession the former will uncancelled. *Held*, that the paper being proved by two witnesses to be in the handwriting of the testator, it is a good will under the law of Pennsylvania, and revokes the former will so far as it is inconsistent therewith. *Arndt v. Arndt*. i. 256
2. A. being indebted to his sons, B. and C., in the sum of three hundred and fifty pounds Irish sterling, made his will, in which he cancelled debts amounting to more than ten thousand dollars, due to him from B., whom he had also previously advanced, to the amount of six thousand dollars, and then gave him five hundred dollars and *no more*. To C. he gave some small specific legacies, and one fourth of the residue of his estate, which he directed to be equally divided between his wife, his son C., and his two daughters, after certain legacies to his wife, his daughters, and other persons. He died leaving a small real estate, and personal property worth two hundred and fifty-five thousand dollars. *Held*, that the debt due from the testator to his sons was not extinguished by any thing contained in the will. *Byrne v. Byrne*. iii. 54
3. A man has a right, by fair argument and persuasion, to induce another to make a will, and even to make it in his own favour. *Miller v. Miller*. *Ibid*.
4. If a man, having two wills in his hand, intending to destroy the last, by mistake destroys the first, the law does not require, in order to revive and establish the will intended to be destroyed, such proof as is necessary to give validity to an original will, namely, proof by two witnesses. *Burns v. Burns*. iv. 295
5. Evidence of the intention of the testator, as to which will he intended to destroy, may be rebutted by contrary evidence, though by but one witness. *Ibid*.
6. The act of assembly being silent as to revocations in law, questions arising on such revocations, must be proved as other matter of fact, without regard to the form prescribed by the act of assembly for the probate of wills. *Ibid*.
7. R. G. died, leaving to survive her R. H., a daughter of T. P. deceased, a brother of R. G. of the whole blood, and a nephew and several nieces, the children of G. P. a brother of R. G., enclosed in a paper which she placed in a mahogany box, several bonds, and a certificate of bank stock, which were found by the administrator after her death, with the words, "For R. H.," written on the envelope in R. G.'s own handwriting, which was proved by two witnesses. She also enclosed in her lifetime, in another paper which was so found by the administrator after her decease several other bonds, among which was one from G. P. to R. G., on which there was a testamentary indorsement, in favour of her nephew, the son of G. P. dated five years before her death. On the envelope of the last-mentioned bonds, the words, "For the heirs of G. P.," was written in the handwriting of R. G., which was also proved by two witnesses. The papers so directed and indorsed remained in the possession of R. G., during her life without her having made any delivery of them in any form, or having communicated the circumstance to any one. *Held*, that the papers so indorsed, could not be admitted to probate, as a will in writing of R. G. *Plumstead's Appeal*. iv. 545
8. The execution of a will, must be proved by two witnesses, each of whom must separately depose to all facts necessary to complete the chain of evidence; so that if one witness only were required, the will would be fully proved by the evidence of either. *Hock v. Hock*. vi. 47
9. The issue of the *devisavit vel non* involves the validity of the execution of a will and not its contents; but so far as the contents have a bearing on the question of execution, they

- are pertinent. In connexion, therefore, with evidence of a conspiracy between the father and mother of the testator, and of fraud and imposition on the testator's wife, evidence that the estate came by the wife, that it was valuable, and that she had been practised upon to induce her to consent that it should be converted from real into personal estate, is competent. *Patterson v. Patterson*. vi. 55
10. To constitute a valid will for the disposition of real estate, it is necessary that it should be reduced to writing in the lifetime of the testator, and proved by two witnesses; but signing by the testator, formal publication, and attestation by subscribing witnesses, are not required. *Rossetter v. Simmons et ux.* vi. 55
11. The authentication of a will by the requisite number of witnesses, is matter of law for the determination of the court; the sanity of the testator, and all questions of fraud, belong to the jury. Where, therefore, the court confounded these questions, and submitted to the jury the question as to the due execution of the instrument, instructing them at the same time that it was necessary to prove the testator's knowledge of the contents of the will by the same number of witnesses as were required to prove its execution, it was held to be error. *Lewis v. Lewis.* vi. 489
12. Where the execution of a will, by a blind or illiterate man, is proved by two witnesses, one witness is sufficient to rebut the imputation, that a paper of the contents of which he was ignorant was imposed upon him. So, on the other hand, one witness is sufficient to set aside a will on the ground of fraud. *Ibid.*
13. Devise of parts of the real estate, and the whole personal estate of the testator, after payment of his debts, to his daughter, her heirs, executors, administrators, and assignees, with an executory devise over, in case she should die in her minority and without lawful issue. If she die in her minority and without lawful issue, but leaving a husband surviving her, the yearly income or profits of the real and personal estate, beyond what was expended in the maintenance and education of the testator's daughter, should go to her personal representative, the husband. *Case of Lefevre's Appeal.* vi. 556
14. Though such will direct that the daughter shall be maintained and educated out of the estate, at the direction and discretion of her guardians named therein, they are bound to maintain and educate her out of the profits of the estate in the first instance, and cannot, if they are sufficient, break in upon the principal of the personal estate, for the purpose of creating a greater accumulation of the profits of the real estate. *Ibid.*
15. An administrator who is one of the plaintiffs on the suit, may be examined as a witness for the plaintiffs, after he has executed a lease to the heirs of his claims to commissions, and has paid to the prothonotary a sum sufficient to pay all the costs, which have accrued or may accrue, to be applied to such payment, let the verdict be as it may, unless it appear that he is in danger of being involved in a *devastavit*. *Patton's Administrators v. Ash.* vii. 116
16. If it be stated in the record of the Orphans' Court, of the proceedings for the sale of an intestate's land, that certain administrators of such intestate came into court, and requested the sale, one of those administrators cannot afterwards be received in a suit respecting the lands as a witness to prove that she did not consent to the sale. *Selin v. Snyder.* vii. 166
17. A co-heir of lands descended from an intestate, may be called by the defendant as a witness to testify against the other co-heirs who are plaintiffs, where he is not a party to the suit. *Nass v. Vanswearingen.* vii. 192
18. *It seems* a person may be compelled to testify, though his evidence would operate against his interest in another action. *Ibid.*
19. Where a man retains a revocable instrument, such as a will, and with a full opportunity to revoke it, does not do so, a strong presumption arises that he wishes it to stand, though at first it may be unfairly obtained from him. But no such presumption can arise, where soon after the execution of the instrument, he is taken ill and dies: or where, from the time of execution to his death, his intellects are in too weak a state to judge of the propriety of revocation. The jury are to judge, whether the testator was in such a

- state of mind, as enabled him to judge of the propriety of cancelling a will obtained by fraud or undue influence. *Irish v. Smith*. viii. 573
20. In ejectment the probate of a will is *prima facie* evidence. *Dornick v. Reichenbach*. x. 84
- Mere feebleness of intellect, short of what might by many be supposed to amount to idiocy, is insufficient to render a will void. *Ibid*.
21. A man who had two children, and was seized of two tracts of land, nearly equal in value, and possessed of personal estate, devised one tract to one child, and the other to the family of the other child, and gave a pecuniary legacy to a bastard grand-child. He afterwards sold one of the tracts of land, and incurred debts which swept away the other, and died, leaving no more estate than was sufficient to pay his debts, and the legacy to his illegitimate grand-child.
22. Held, that these circumstances did not amount to an implied revocation of his whole will. *Wogan v. Small*. xii. 141
23. Where a will has been admitted to probate by the register, and the executor has acted under it, although the will be afterwards revoked, the accounts of such executors may be filed before the register, and presented to the Orphans' Court, and they are bound to make a decree in respect to them. *Peeble's Appeal*. xv. 39

WITNESSES.

See APPEARANCE, 1. ARREST, 1,
2. BILL OF EXCEPTIONS, 12.
COURT, 16. EVIDENCE. FO-
REIGN ATTACHMENT, 5, 6, 7.
NOTARY PUBLIC, 3. PAUPER, 4.
WILL, 9, 45, 6, 10, 11, 17, 18.

1. Subscribing witnesses are not essential to a good deed. It is enough if there is a sealing and delivery; and on proof of the handwriting of the obligor, the jury may presume the sealing and delivery. *Long v. Ramsay, Executor of Long*. i. 72
2. It is not necessary that depositions of witnesses, taken under a commission, should be subscribed by the witnesses. *Moulson v. Hargrave*. i. 201
3. A witness who is liable to an action by the party for whom he is called, in case that party should not recover, but who is protected from such an action by the statute of limitations, is competent. *Ludlow v. The Union Insurance Company*. ii. 119
4. A vendor with general warranty is a good witness to establish a title against that of his vendee. *Work v. Lessee of M'Clay*. ii. 415
5. Where the only subscribing witness to a receipt had made his deposition, and remained till seven days before the trial within the jurisdiction of the court, and was not subpoenaed, and then went beyond the jurisdiction of the court, without the party being apprized of his intention, his deposition was held good evidence. *Hamilton v. M'Guire*. ii. 478
6. Query, If in such case there be the name of another person signed as witness to a receipt offered in evidence, who is not produced, his handwriting must not be proved. ii. 478
7. An auctioneer sold goods to the defendant and committed them to the care of the plaintiff, his servant, to be delivered to the defendant on his performing certain conditions. The defendant by artifice, and without performing the conditions, obtained the possession. Such auctioneer may be a witness for the plaintiff in replevin for the goods. *Harris v. Smith*. iii. 20
8. Proof that a witness offered by the defendant had said about two years before the trial, "that every cent which should be recovered in that action, would be deducted out of his wife's estate," does not render him incompetent; it is only his opinion at the time of taking the oath which can have any influence upon him. *Fernsler v. Carlin*. iii. 130
9. Query, Whether a witness's thinking himself interested at the time of swearing, when he really is not, renders him incompetent. *Ibid*.
10. On a feigned issue between creditors to try the validity of a bond given by an insolvent, the obligor is a good witness to prove that it was *bona fide*, and for a valuable consideration. *Wolf v. Carothers*. iii. 240
11. Query, Whether such obligor could, on cross examination, be compelled to answer questions tending to show he was guilty of fraud in relation to the bond. *Ibid*.
12. The declarations of such obligor, made in the absence of the obligee, are not evidence to destroy the bond. *Ibid*.
13. An administrator, who was the

- intestate's clerk, is a good witness in a suit in which he is plaintiff, to prove a book to be the book of original entries of his intestate, and that he himself made certain original entries in that book, if it do not appear that there are any persons living, who can make that proof, and the other clerks of the intestate are dead. *Ash v. Patton.* iii. 300
14. In order to remove the objection to a plaintiff's evidence, on the ground that he is liable to costs, it is necessary that not only the costs which had accrued, but those which might accrue, should be paid, and that the plaintiff should stipulate that in no event should these costs be refunded. *Ibid.*
15. One who is security in the recognizance on appeal, may be discharged by the court, and other security taken in his stead, in order to make him a witness. *Salmon v. Rance.* iii. 37
16. One who has sold part of the land in dispute, for a bond, without warranty, is a good witness for the plaintiff; nor is it any objection to him that he gave the vendee a covenant of warranty in case the plaintiff should recover; for he swears against his own interest. *Ibid.*
17. If a writ be issued against two, and only one be taken, and the suit proceed against him alone, the other is not excluded from being a witness on the ground that he is a party to the suit. *Purviance v. Dryden.* iii. 402
18. A witness is incompetent on the ground of interest, who is offered by the plaintiff to prove that the witness received the money for which the action is brought, on account of a firm, in which he and the defendant were the partners, that he paid it over to the defendant, who paid it away principally for debts of his own, contracted before the partnership. *Ibid.*
19. In ejectment, a person who had a judgment against the plaintiff's intestate, unpaid, and a *scire facias* upon it depending, which had been served on the tenant of the land in dispute, but the personal property was many times the amount of the debt, and the administratrix had given security, and it did not appear how the property was administered, was held to be a competent witness for the plaintiff. *Youst v. Martin.* iii. 423
20. The plaintiff is a competent witness to prove notice to the defendant to produce a deed. *Jordan v. Cooper.* iii. 564
21. It is no objection to the competency of a witness, that he believes himself interested in the event of the suit, when in fact he is not so. *Long v. Bailey.* iv. 222
22. Nor will an *honorary* engagement which cannot be enforced at law, exclude his testimony. *Ibid.*
23. A witness cannot deprive a suitor of his testimony, by becoming interested, for the purpose of rendering himself incompetent. *Ibid.*
24. If a witness state his impressions from particular circumstances, without stating what those circumstances were, *e. g.* if he state, that "in all the different conversations with I. S. he always understood the said I. S. allowed the land in dispute to be the property of C. S." and nothing more, his deposition cannot be read. *Samphson v. Samphson.* iv. 329
25. A witness in a civil suit may be compelled to give evidence which may affect his interest, provided it does not tend to convict him of a crime, or subject him to a penalty. *Baird v. Cochran.* iv. 397
26. The grantor in a deed, is a competent witness to prove that when he executed it he had no title. *Brown v. Downing.* iv. 494
27. One who has purchased land in his own name, but as agent and trustee of another, to whom he afterwards conveyed the legal title, is a good witness to prove the trust. *Ibid.*
28. The court will not reverse a judgment for errors, which an inferior court may commit, in the course of a preliminary examination of a witness, which is totally unnecessary to his admission. *Ibid.*
29. A witness may be permitted to swear for whom an application was intended by the person who put it into the land office. Whether he speaks from such knowledge as will entitle him to belief, is a matter of which the jury are to judge. *Lessee of Delaney v. Little.* iv. 503
30. The holder of a promissory note drawn in favour of A., and indorsed by A., B., and C., gave up the note to A., and took a bond for the amount from A., B., and C. Held, that in a suit in the name of the holder for the benefit of A., C. was a competent witness for A. *Juniata Bank v. Brown.* v. 226
31. A stockholder in a bank, being of-

- ferred as a witness in favour of the bank, executed a transfer of his stock to his daughter, then at a distance, and without her knowledge, and delivered it to the cashier for her use: *held*, that he thereby became a competent witness. *Smith v. The Bank of Washington.* v. 318
32. One of two executors, defendants in the suit, cannot be a witness for the defendants on the plea of *non-assumpserunt*, payment and set-off, though all the costs which have accrued have been paid, as well as those which could accrue to the end of the suit. *Conrad v. Keyser.* v. 370
33. A nominal plaintiff, in whose name a suit is brought by the party beneficially interested, is a witness for the latter on a sum sufficient to cover all the costs being paid into court. *Brown v. Weir.* v. 401
34. One who has made an assignment of all his estate, in trust to pay his debts, and to return the surplus, if any, to himself, is a competent witness in an action of trover brought by his assignees against one of his creditors who claims to hold goods as a security for the debt due from the assignor; because the interest which the witness has in the surplus is balanced by his interest in the application of the property in the hands of the defendant to the extinguishment of the debt due to him. *Jacoby et al. v. Laussatt.* vi. 300
35. An administrator, who is one of the plaintiffs in the suit, may be examined as a witness for the plaintiffs, after he has executed a release to the heirs of his claims to commissions, and has paid to the prothonotary a sum sufficient to pay all the costs, which have accrued or may accrue, to be applied to such payment, let the verdict be as it may, unless it appear that he is in danger of being involved in a *devastavit*. *Patton's Adm. v. Ash.* vii. 116
36. Collateral parol promises made by the vendor, on the execution of articles, or of a deed to indemnify the vendee against incumbrances, are merged in a warranty in the deed against those incumbrances, and cannot be taken advantage of in a suit for the purchase money, where they are not alleged as proofs of fraud. It follows that any special damage sustained in consequence of the non-performance of such promises is not evidence in such suit. *Share v. Anderson.* vii. 43
37. A quit rent out of land sold, against which there is a covenant of warranty in the deed, is not to be estimated and deducted from the purchase money, but only the arrearages. *Ibid.*
38. A witness stated, in the course of his examination, that he had been sent by the plaintiff, in whose service he was, with goods to the defendant, and received orders to bring the goods back unless the money was paid, but that the defendant obtained possession of the goods by stratagem, and refused to deliver them unless the witness would receive the note of T. R. in payment. *Held*, that it did not appear from the whole of his evidence, that he did not voluntarily surrender the possession of the goods, and was therefore not liable to an action by the plaintiff for a breach of orders, his competency was not affected. *Wilmarth and another v. Mountford and another.* viii. 124
39. Where evidence has been given from which the jury may infer that a lottery ticket had been actually in his possession, the plaintiff is a competent witness to prove its loss. *Snyder, for the use of Etter, v. Wolfey and another, surviving Obligors of Hipple and Gish.* viii. 328
40. Whether a witness, whose deposition is offered in evidence, be able to attend the trial or not, is a matter which the court below are to inquire into and decide. *Vincent v. The Lessee of Huff.* viii. 381
41. Where an action, brought in the name of one, is afterwards marked to the use of another, before the plaintiff on the record can give evidence, he should release all interest in the action, and the costs, up to the time of marking it to the use of another, should at least be paid. *Richter v. Selin.* viii. 425
42. If it does not distinctly appear that a witness is interested, the court will not reverse the judgment, because the evidence has been received. *Irish v. Smith.* viii. 573
43. Where a chose in action is equitably assigned, and suit is afterwards brought by the assignee, in the name of the assignor for his use, the assignor, if he have no interest, is a competent witness for the plaintiff. *Fetterman v. Plummer's Administrator.* ix. 20
44. The indorser of a promissory note is not a competent witness in a suit

- against the maker, to prove that though drawn as a note of business, and so discounted by the holder, it was really in its origin a note for the accommodation of the indorser, especially if the indorser gave a note of indemnity to the maker when the note was given. *Bank of Montgomery v. Walker.* ix. 229
45. A plaintiff on the record, in an action of trespass *de bonis asportatis*, may assign his interest and become a witness; but it seems that a plaintiff in slander, assault and battery, or crim. con. could not. *North v. Turner.* ix. 244
46. An assent to such assignment by absent persons, will be presumed where it is matter for a valuable consideration, and is beneficial to them. *Ibid.*
47. A plaintiff on record, after assignment of his interest, may be a witness on paying sufficient to cover all the costs that have accrued or may accrue, without an express stipulation not to claim any return. *Ibid.*
48. One of two joint obligors not summoned, is not a witness for the other who is summoned, to prove under notice of set-off, a debt due from the plaintiff to the witness, though the witness is released by the defendant. *Henderson v. Lewis.* ix. 379
49. A trustee of an insolvent debtor who releases all his claims as creditor to the insolvent, is a good witness on his behalf in a suit in the insolvent's name for the use of his creditors. *Stoeber v. Stoeber.* ix. 434
50. A grantor without general warranty, is a competent witness in favour of the grantee, and if he has conveyed with an understanding that the property is still to be his, merely that the grantee may carry on the suit, it goes only to his credibility. *Dornick v. Reichenbach.* x. 84
51. The defendant cannot call a person on his behalf as a witness where the plaintiff has contracted that the witness' right shall depend on the event of the question to be determined in the suit. *Robinson v. Eldridge.* x. 140
52. In a suit against the surety in a recognizance for a stay of execution, one of the defendants against whom judgment was obtained in the original suit, is not a competent witness for the defendant. *Milliken v. Brown.* x. 188
53. An agent is a competent witness to prove his own authority by parol, to make a parol lease. *McGunnagle v. Thornton.* x. 251
54. One who had been a stockholder in a company, and had transferred his nine shares of stock therein to the company, with a guarantee that they should sell at par, is not a competent witness for the company, in a suit brought by them to recover the amount due by a person who subscribed to their stock, if such shares are still held by the company, and the market price is under par. *Grayble v. York, &c. Turnpike Company.* x. 269
55. Where such grants are made of the same land to contending claimants, with a general warranty, the widow of the grantor is a witness in an ejectment by one against the other, for her interests are in equilibrio. *Brindle v. McIlvaine.* x. 282
56. In a suit against an agent to recover back money improperly paid to him, on the ground that there was nothing due to the principal, on whose account he received the money, the principal is a witness for the agent who alleges payment over without notice. *Seidel v. Peckworth.* x. 442
57. One who has given his bond and judgment as a collateral security for a note indorsed by the defendant, is not a competent witness for the defendant in a suit brought against him as an indorser, to prove that the note is paid. *Sterling v. The Marietta and Susquehanna Trading Company.* xi. 179
58. The drawer of an accommodation note is not competent to prove payment, in a suit against the indorser. *Ibid.*
59. Evidence to discredit a witness, must go to his general character, and not to particular acts of misconduct. *Wike v. Lightner.* xi. 198
60. A witness called to discredit another witness, cannot be asked, "Have you ever heard, of others, whether he was a dishonest man, or bore a bad character?" *Ibid.*
61. If a witness, on being asked whether he would believe a witness who had been examined on the opposite side on his oath, answer, "I would not place as much confidence in his testimony as in that of a man of integrity," it is not evidence. *Ibid.*
62. After a paper has been read to the jury, and evidence given by the opposite side, of declarations of one of the parties to the suit, as to where

- it was found, that party cannot be examined, to prove where the paper was found, in contradiction to his declarations. *Lodge v. Phifer*. xi. 333
63. A witness, who, though a man of business, and much conversant with writings, had never been employed in detecting forgeries, cannot be asked whether papers proved to be in the handwriting of a particular person, and a paper alleged to have been forged, are, in his opinion, in the same handwriting. *Ibid.*
64. It seems, that such a question would not be proper, even to an expert in the examination of writings. *Ibid.*
65. A plaintiff executor, who has paid all the costs which have accrued, or which may accrue in the suit, is not a competent witness, without having released the commissions to which he may be entitled on the money to be recovered. *Anderson et al. Executors of Porter, v. Neff*. xi. 208
66. If a person, called to prove what a deceased witness testified, states, that he recollects the amount and substance of what the deceased said; that he recollects that there was a cross examination, but cannot recollect what questions were put, he cannot be received as a witness. *Watson v. Gilday*. xi. 337
67. In an action by the indorser against the maker of a promissory note, the indorser is a competent witness to prove that the defendant had notice of the indorsement before he acquired a claim upon the indorser, which he had given in evidence as a set-off. *Zeigler v. Gray*. xii. 42
68. Where a bond has been assigned, with a guarantee by the assignor for the payment of it, the guarantee runs with the bond; into whose hands it may pass; and the assignor is not a competent witness, in a suit brought by a subsequent assignee, to prove matters tending to show that the bond has been discharged. *Reed for the use, &c., v. Garvin et al.* xii. 100
69. A plaintiff, who pending the action, assigns all his interest in the claim he is prosecuting to a third person to whom he is indebted, to whose use the action is marked, and who thereupon acknowledges under hand and seal, that his debt is satisfied, to the amount of the plaintiff's claim against the defendant, and releases him from the same, is upon paying the costs a competent witness. *Willing v. Peters*. xii. 177
70. A commissioner of the township of Moyamensing, who is a taxable inhabitant, actually assessed and rated as an inhabitant, and the owner of real estate in the said township, but who has paid all the taxes assessed upon him, is a competent witness for the township, by virtue of the act of the 2d of April, 1822, in a suit instituted prior to the passage of the act. *McFarland v. Commissioners of Moyamensing*. xii. 227
71. A witness, after having refreshed his memory by the inspection of a paper, may be asked whether the articles mentioned in the paper were sold to the plaintiff. *Babb v. Clemson*. xii. 328
72. It is no objection to the competency of a witness, that his testimony would tend to clear him of a fraud, imputed to him by another witness. *Ibid.*
73. A party, against whom a witness is produced, has a right to ask him every thing which may in the slightest degree affect his credit; he may therefore ask him whether the party for whom he is a witness did not purchase the witness's real estate at the request of the witness. *Cameron v. Montgomery*. xiii. 129
74. Whether one who has a share in the profits of a commercial firm, under an agreement not to be liable for losses, be a dormant partner or not, and, as such, answerable for the debts of the firm: he is not a competent witness for the firm in an action in which they are plaintiffs, unless he has executed a release of all his interest in the suit; in which case he is competent, because, admitting his liability for debts, his interest is too remote to affect his competency; provided there be no evidence of the liability of the other partners to pay the debts of the firm. *Curcier et al. v. Pennock*. xiv. 51
75. W. was bound for surety for E. in a bond to M. R. having brought suit against S: S. paid to M. the amount due on R's. bond to him, and took the bond with a view to set off in the suit brought against him by R., and an agreement was indorsed upon the bond, that the money should be repaid by M. if the set-off was not allowed. On the trial of the action, upon the agreement, brought by S. against M. to recover

back the money paid by the former to the latter, in which the principal question was, whether the set-off had been allowed, *W.*, the surety, was held not to be a competent witness for the defendant, being directly interested in the event of the suit. *Reigart v. Hix.* xiv. 134

76. The creditor of a deceased person may be a witness for his personal representative, where it does not appear with certainty that the estate is insolvent. *Boyer v. Kendall.* xiv. 178

WOOD.

1. Under the act of the 10th of *March*, 1817, the officer appointed by the corporation of the city of Philadelphia for the cording of wood, has no right to enter on a private wharf or landing unless wood be taken there which is subject to seizure, and the owner may lawfully prevent the officer from coming there for other purposes. *Commonwealth v. Gillam.* viii. 50
2. The ordinance of the city of Philadelphia, of the 28th of *January*, 1808, is so far as it concerns private wharves or landings, superseded by the act of the 10th of *March*, 1817. *Ibid.*

WORDS.

See SLANDER, 1, 10.

WRIT OF ERROR.

See ARBITRATION, 24. BAIL, 4. CERTIORARI, 3. ERROR. EXECUTOR, 5. FEIGNED ISSUE, 1, 2, 3. HABEAS CORPUS, 2. SUPREME COURT, 1, 2, 3.

1. The court will not quash a writ of error, because the oath, that it is not intended for delay, was made before the trial of the cause. *Miles v. O'Hara.* i. 32
2. When the opinion of the court below is filed, according to the act of the 24th of *February*, 1806, a writ of error may be prosecuted, without a bill of exceptions having been sealed. *Downing v. Baldwin.* i. 298
3. If a statement of facts be necessary in order to understand the opinion of the court, it must appear upon the record; but not otherwise. *Ibid.*
4. A writ of error does not lie upon an order made by the court below, to discharge a juror. *Eichelberger v. Nicholson.* i. 430
5. A judge who files his opinion under the act of the 24th of *February*, 1806, cannot be compelled to return the evidence on which that opinion was founded. *Bassler v. Niesly.* i. 431

6. There is nothing in the act which prevents the proceeding by way of bill of exceptions, although the opinion of the court be filed. *Ibid.*
7. *It seems*, however, to be the duty of the court to permit (under certain regulations) the necessary evidences to be placed on the record, without a formal bill of exceptions. *Ibid.*
8. *Query*, Whether a landlord of the defendant who has been active in defending the ejectment, but is no party on the record, can sue out a writ of error, and make the oath, and give the security required by law? *Vanhorn v. Frick.* iii. 278
9. A writ of error does not lie upon a refusal by the court below to strike off an appeal from the award of arbitrators. *Kendrick v. Overstreet.* iii. 357
10. A writ of error takes its effect from the time of its delivery to the prothonotary of the Common Pleas, not from the time of its issuing. *Frantz v. Kaser.* iii. 395
11. In computing the twenty days, in which a writ of error is not permitted on an award of arbitrators, either the day of filing the award, or the day of filing the writ of error is excluded. *Ibid.*
12. A writ of error does not lie upon proceedings in domestic attachment. *Lewis v. Wallick.* iii. 410
13. The court will not decide on alleged errors in the execution, if the writ of error does not mention the execution. *McFarlin v. McDowell.* iii. 413
14. A writ of error lies on the report of arbitrators appointed under the act of the 20th of *March*, 1810. *Siccard v. Peterson.* iii. 468
15. A cause is well removed by writ of error, though the recognizance of bail be not conformable to law, but the writ will not operate as a supersedeas. *Magill v. Kauffman.* iv. 317
16. Where a writ of error is brought by the plaintiff, this court may enter such judgment as ought to have been entered below; but where it is brought by the defendant the judgment can only be reversed. *Swearingin's Executor v. Pendleton's Executrix.* iv. 389
17. A writ of error does not lie in a manner in which the court below are entitled to exercise a discretion, on a view of all the circumstances of the case. *Renninger v. Thompson and another.* vi. 1
18. If the affidavit required by the 6th section of the act of the 11th of

- March*, 1809, to be made on purchasing a writ of error, be not filed until after the writ is issued, and the record returned to this court, it is too late. *Beal and another, Administrators v. Patterson.* vi. 89
19. The affidavit cannot be dispensed with, because the plaintiff in error is an administrator. *Ibid.*
20. Upon a judgment in trespass against several defendants, one alone cannot maintain a writ of error. *Potterall v. Floyd.* vi. 315
21. *It seems*, that one may take out a writ of error in the name of all; and if the others refuse to join in the prosecution of it, they may be summoned to the court of error and severed, after which he who sued out the writ may go on alone; or a rule may be made on those who are named as plaintiffs in a writ of error, and do not appear, either to appear and join in the prosecution of it, or submit to be severed. *Ibid.*
22. A writ of error does not lie upon an order of the Court of Common Pleas staying proceedings on a bail bond, though the bail bond suit had been previously arbitrated and an award had been made in favour of the plaintiff. *Roop and another, Executors of Brubacker, assignees of the Sheriff v. Meek and another.* vi. 542
23. Writ of error ordered to be amended by the *fratise*. *Guhr and another v. Chambers.* viii. 157
24. If the parties submit their case to arbitrators, who are to make a report in writing to the court, of "all legal points and objections reported, upon exceptions filed to the decisions of the arbitrators," the opinion of the court below upon such points, is not the subject of a writ of error. The case stands on the same footing as a case stated. *Fuller v. Trevor and another.* viii. 529
25. The court below, having arrested a judgment obtained by husband and wife, for slander of the wife, for which they sued out a writ of error, this court abated the writ, because it appeared the wife had since died. *Strooph et ux. v. Swartz.* xii. 76
26. This court will not, in general, proceed upon a writ of error, contrary to the agreement of the parties; but the rule is not applicable to the case of a judgment of imprisonment for life. *Smith v. The Commonwealth.* xiv. 69
27. In suits on bonds, which were the consideration money of land sold, the parties agreed by writing filed in the cause, that the title was defective for part of the land, that the plaintiff was to deliver a good title, and that if a good title should be delivered, the defendant claimed a deduction of various items stated, and that the court should determine the legality of these claims, and auditors should settle the amount: *held*, that the court, after deciding that the plaintiff could not give a good title for two sevenths of the portion of the land in question, might set aside the agreement so far as to order a trial, and that their decision on the point was not a subject of a writ of error. *Fulweiler v. Baugher.* xv. 45

WRITS.

See VARIANCE.

There is a difference between writs which are erroneous, and those which are issued irregularly, and by the fault of the party. *Allison v. Rheam.* iii. 139

WRITTEN INSTRUMENT.

See PAROL EVIDENCE, 10, 11, 12.

1. The court is to give the construction of a written instrument, except where it cannot be understood without reference to facts *dehors* the writing; and, in that case, the jury are to judge of the whole together. *Watson, Administrator of Davis, v. Blaine et al. Executors of Blaine.* xii. 131
2. Where a writing contained, in the first part of it, a certificate that A., prior to its execution, had sold to B. seven hundred acres of land, and that a survey, made by S. L., the deputy surveyor, containing two hundred and nineteen acres, seventy-six perches, and the allowance of six per cent., was part of the aforesaid tract, for which the said B. had paid him four pounds five shillings, specie, per acre; and then followed a covenant, by the said A. to make to the said B. or his assigns, a deed of conveyance for the aforesaid two hundred and nineteen acres, and seventy-six perches, clear of every incumbrance, &c. *Held*, that the payment of four pounds five shillings, specie, per acre, referred only to the two hundred and nineteen acres and seventy-six perches, and not to the whole tract of seven hundred acres. *Ibid.*

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